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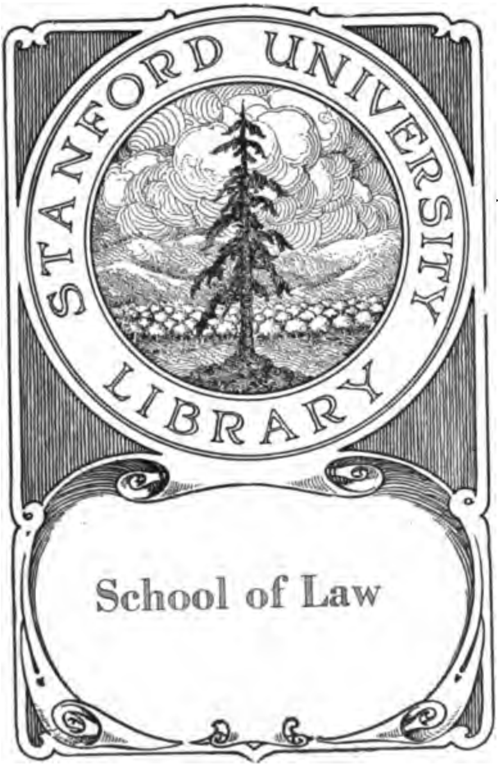
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# TABLE OF CASES REPORTED.

A. PAGE

Alter, In re Estate 221
Arbitration—Ontario v. Quebec 212

B.

Baker, Davidson v. 328
Bancroft, Sutton v. 40, 65
Bennett, Edwards et al v. 86
Blakely and Wife, City of Detroit v. 297
Bonathan v. Bowmanville, &c. 100
Bowmanville, &c., Bonathan v. 100
Bristol & Exeter Railway Co., Shepherd v. 315
Brown v. McGuffin—G. W. R. Co. 268
Brown, Westover v. 180
Bubb v. Yelverton 329

C.

Caldwell, In re 227
Carter et al v. LeMesurier 229
Citizens' Insur. and Inv. Co., Union Permanent Building Society v. 181
City of Detroit v. Blakely and Wife 297
Coates v. Parkgate Iron Co. 239
Commercial Bank v. Harris 181
Cooper, In re 317

D.

Davidson v. Baker 323
Davidson et al v. Grange 318
Davies, Rutledge v. 244
Decow v. McCallum et al. 65
Detroit v. Blakely and Wife 297
Donelly v. Tegart 291
Durrant, Macklem v. 11

E.

Eames, Lambe v. 268
Edwards et al v. Bennett 86

F.

Fair v. James 320
Fair v. London & N. W. Railway Co. 40
Farrow v. Wilson 17
Ferris, Reg. ex rel. Halsted v. 266
Flater, Reg. ex rel., v. VanVelsor 151
Florey v. Royal Canadian Bank 317
Freeman v. Pope 240
Friedman v. Railroad Co. 185

G. PAGE

Gale, Montgomery v. 13
Garvin, Orok v. 62
Gibb v. White, Reg. ex rel. 153
Gilliatt v. Gilliatt 42
Glass, Robertson v. 11
Grange, Davidson et al v. 318
Grand Trunk Railway Co., McMurray v. 294
Grant v. Grant 218
Grover & Baker v. Webster 180

H.

Halsted, Reg. ex rel., v. Ferris 266
Hartleb v. Phelan 318
Harris, Commercial Bank v. 181
Hatch v. Rowland 228
Herrick v. Woolverton 330
Hilton v. Tipper 314
Hine, Pickard v. 41

J.

James, Fair v. 318
Jacobs v. Sheward 268
Jackson v. Spittall 325

K.

Kerr, Pennsylvania Railroad Co. v. 186
Kilham, Queen v. 266
Kinne, In re 96
Knapp & Potter, In re 125

L.

Lambe v. Eames 268
Lawlor, McGouverin v. 128
Leahy v. Phelan 184
LeMesurier, Carter et al v. 229
Lever's Trusts, In re 18
Lewis v. Teale et al 181
Lewis, Rooney v. 321
London & N. W. Railway Co., Fair v. 40

M.

Machin, Wanham v. 328
Macklem v. Durrant 11
Macaulay v. Neville & Macaulay 264
Mackonochie, Martin v. 67
Martin v. Mackonochie 67
Matheson, Royal Canadian Bank v. 9

PAGE
Molloy v. Shaw ... 294
Montgomery v. Gale ... 18
Morris, Pearce v. ... 41
Murdock, Penton v. ... 154

Mc.
Macaulay v. Neville and Macaulay ... 264
McCallum, Decow v. ... 65
McGouverin v. Lawlor ... 128
McGuffin, Brown v. ... 263
McInnes et al v. Western Assurance Co. ... 292
McIntyre, Stacey v. ... 127
McLeod, Reg. v. ... 64
McMurray v. Grand Trunk Co. ... 294
McPherson et al v. McPherson ... 266
McRae, Reg. ex rel., Ford v. ... 94

N.
Neville & Macaulay, Macaulay v. ... 264

O.
Ontario, Province of, and Quebec, Prov. of. .. 212
Orok v. Garvin ... 62

P.
Parker v. Simpson ... 43
Parkgate Iron Co., Coates v. ... 239
Patrick, Roche v. ... 129
Pearce v. Morris ... 41
Penton v. Murdock ... 154
Pennsylvania Railroad Co. v. Kerr ... 186
Phelan, Hartleb v. ... 318
Phelan, Leahy v. ... 184
Phene's Trusts, In re ... 101
Picard v. Hine ... 41
Pope, Freeman v. ... 95, 240
Potter and Knapp, In re ... 125
Prentiss v. Shaw et al ... 43, 73

Q.
Quebec, Province of, Ontario, Prov. of, and .. 212

R.
Railroad Co., Friedland v. ... 185
Reiffenstein, Reg. v. ... 88
Reg. v. Kilham ... 266
Reg. v. McLeod ... 64
Reg. v. Reiffenstein ... 38
Reg. v. Ritson & Ritson ... 38
Reg. v. Robinson ... 98
Reg. ex rel. Ford v. McRae ... 94
Reg. ex rel. Flater v. VanVelsor ... 157
Reg. ex rel. Gibb v. White ... 153
Reg. ex rel. Halstead v. Ferris ... 266
Reg. ex rel. McGouverin v. Lawlor ... 128
Ritson & Ritson, Reg. v. ... 15
Robertson v. Glass ... 11
Robson v. Warren & Washington ... 14
Roche v. Patrick ... 129
Robinson, Reg. v. ... 98
Robinson v. Wood ... 18
Rooney v. Lewis ... 321
Rowland, Hatch v. ... 228
Royal Canadian Bank v. Matheson ... 9
Royal Canadian Bank, Florey v. ... 317
Royal Exchange Assurance, Yglesias v. ... 154
Rutledge v. Davies ... 244

S.
School Trustees, Scott v. ... 262
Scott v. School Trustees ... 262
Shaw, Molloy v. ... 294
Shaw et al, Prentiss v. ... 43, 73
Shepherd v. Bristol & Exeter Railway ... 315
Sheward, Jacobs v. ... 268
Simpson, Parker v. ... 43
Smith v. Smith et al ... 180
Spittall, Jackson v. ... 325
Stacey v. McIntyre ... 127
Sutton v. Bancroft ... 40, 65
Sykes et al v. Sykes et al. ... 182

T.
Teale et al, Lewis v. ... 181
Tegart, Donelly v. ... 291
Tippen, Hilton v. ... 314

U.
Union Permanent Building and Savings Soc. v. Citizens' Insurance and Investment Co. 181

V.
VanVelsor, Reg. ex rel., Flater v. ... 151

W.
Wanham v. Machin ... 328
Warren & Washington, Robson v. ... 14
Webster, Grover & Baker Sewing Machine Co. v. ... 180
Western Assurance Co., McInnes et al v. ... 292
Westover v. Brown ... 130
White, Gibb, Rag. ex rol v. ... 158
Wilson, Farrow v. ... 17
Wood, Robinson v. ... 18
Woolverton, Herrick v. ... 330

Y.
Yelverton, Bubb v. ... 329
Yglesias v. Royal Exchange Assurance ... 154

# TABLE OF TITLES

CONTAINED IN THE

# DIGEST OF ENGLISH LAW REPORTS.

Abandonment, 269.
Abatement, 131.
Account, 19, 131.
Acquiescence, 19.
Action, 19, 78, 131, 188, 269.
Administration, 19, 78, 131, 188.
Administrator Pendente Lite, 269.
Admiralty, 19, 78, 131, 269.
Admissions, 269.
Adultery, 19, 131, 269.
Affidavit, 19, 131.
Agent, 19, 78, 131, 188, 269.
Agreement, 19, 131.
Alimony, 19, 131.
Ambiguity, 269.
Amendment, 19, 188.
Ancient Lights, 19, 188, 269.
Annuity, 189, 131.
Appeal, 19, 131.
Appointment, 19, 269.
Apportionment, 131.
Appropriation, 132, 270.
Arbitration, 19, 132.
Assault, 19, 270.
Assignees, 78.
Assignment, 78, 132, 189, 270.
Assumpsit, 19, 78, 132, 189, 270,
Attorney, 19, 132, 189.
Attorney-General, 132.
Auctioneer, 270.
Award, 19, 132.

Bail, 132
Bailment, 20, 78, 132, 189, 270.
Bank, 20, 78, 132.
Bankruptcy, 20, 78, 132, 189, 270.
Beer-house, 133.
Benefit Society, 79.
Bigamy, 20.
Bill of Lading, 20, 79, 133, 270.
Bills and Notes, 20, 79, 133, 189, 270.
Bond, 20, 133, 271.
Bottomry, 133, 271.
Building Restriction, 271.
Burden of Proof, 21, 189, 271.
Burial Ground, 279.

Call, 271.
Carrier, 21, 134, 189.
Case stated, 21.
Cases overruled, 134.
Cesser, 189.
Charge, 271.
Charging Order, 21.
Charity, 21, 134, 189, 271.
Cheque, 22, 79.
Chose in Action, 22.
Church, 134.
Class, 271.
Club, 79.
Codicil, 22, 79, 134, 271.
Collision, 22, 79, 134, 271.
Collusion, 272.
Colony, 22.
Commission, 134, 189.
Commitment, 272.
Common Carrier, 22, 134, 189.
Common, Tenancy in, 22, 189.
Company, 22, 80, 134, 189, 272.
Compensation, 190.
Composition, 23.
Compromise, 190.
Concealment, 88.
Condition, 23, 80, 135, 190.
Conditional Limitation, 23, 190.
Confidential Relation, 23.
Confirmation, 272.
Conflict of Laws, 23, 80, 135.
Confirmation, 272.
Confusion, 23.
Congregation, 135.
Connivance, 135.
Consideration, 23, 135, 190.
Conspiracy, 80.
Construction, 23, 80, 135, 190, 272.
Contempt, 23, 135.
Contingent Interest, 23, 135.
Contract, 23, 80, 135, 190, 273.
Contribution, 23, 80, 135, 190, 274.
Conversion, 190.
Conveyance, 274.
Copyright, 23, 135, 190.
Corporation, 23, 80, 191.
Costs, 23, 80, 136, 191.
Court, 23.
Covenant, 23, 80, 136, 191, 274.
Creditor, 23, 136, 191.
Criminal Law, 23, 136, 194, 274.
Crown, 191.
Cruelty, 136, 191, 274.
Curtesy, 23, 80.
Custom, 23, 80, 136.
*Cy Pres*, 274.

Damages, 23, 80, 136, 191, 274.
Death, 24, 136, 192.
Debenture, 136.
Debtor and Creditor, 80, 192.
Declaration, 24.
Decree 24.
Dedication, 137, 275.
Deed, 24, 80, 137.
Delivery, 275.
Demand, 24, 80.
Desertion, 24, 80, 137, 192.
Deviation, 80.
Devise, 24, 81, 192, 275.
Directors, 275.
Disclaimer, 25.
Discovery, 25, 81, 137, 275.
Discretion, 25.
Dismissal, 275.
Disqualification, 25.
Distress, 137.
Divorce, 25, 81, 137, 192, 275.
Domicile, 25, 81, 137.
Dower, 25, 137, 192.
Dying Declaration, 25

Easement, 25, 137, 192, 275.
Election, 25, 81, 192, 275.
Embezzlement, 192.
Entries, 137.
Equitable Assignment, 81, 137.
Equitable Conversion, 81, 137, 192.
Equitable Mortgage, 137, 192.
Equitable Plea, 81, 137.
Equity, 25, 137, 192, 275.
Equity Pleading and Practice, 25, 81, 137, 192, 275.
Error, 25.
Estoppel, 25, 137, 192.
Evidence, 25, 81, 137, 192, 276.
Exception, 81.
Execution, 26.
Executor and Administrator, 26, 81, 138, 192, 276.
Executor de son tort, 192.
Executory Devise, 26, 192.

False Imprisonment, 276.
False Pretences, 155, 276.
Family Name, 155.
Felony, 155.
Fine, 192.
Fishery, 155, 192.
Fixtures, 81, 155, 193, 276.
Foreign Government, 81.
Foreign Judgment, 155, 276.
Foreign Office, 155.
Forfeiture, 26, 81, 193, 276.
Forgery, 155, 193, 276.
Franchise, 193.
Fraud, 26, 81, 155, 193, 277.
Frauds, Statute of, 27, 82, 156, 277.
Fraudulent Conveyance, 26, 81, 193, 277.
Freight, 156, 193, 277.
Friendly Society, 82, 193.

General Average, 193.
Gift, 193, 277.
Governor, 27.
Guaranty, 27, 82, 193, 277.
Guardian, 27.

Heir and Personal Representative, 27, 82.
Highway, 156, 193, 277.
Husband and Wife, 27, 82, 156, 193, 277.

Ignorance, 44, 277.
Illegal Contract, 44, 82, 156, 193, 277.
Illusory Suit, 156.
Implied Grant or Reservation, 44.
Incumbrance, 156.
Indemnity, Act of, 44.
Indictment, 44, 193, 277.
Infant, 194, 277.
Injunction, 44, 82, 156, 194, 277.
Insanity, 45, 194.
Insolvency, 82, 156, 194.
Inspection of Documents, 156, 194.
Insurance, 45, 82, 156, 194, 277.
Intention, 277.
Interest, 45, 82, 156, 195.
Interpleader, 45.
Interrogatory, 82.
Investment, 156, 278.
Invitation, 45.

Joint Tenancy, 45, 278.
Jurisdiction, 45, 106, 156, 195.

Laches, 45, 195.
Landlord and Tenant, 45, 106, 156, 195, 278.
Lapsed Devise, 45.
Larceny, 156.
Law of Nations, 45, 106.
Lease, 45, 106, 195, 278.
Legacy, 45, 106, 156, 195, 279.
Legacy Duty, 157, 195.
Legislature, 46.
Letter of Credit, 195.
Lex Loci, 106, 157.
Libel, 46, 106, 157, 195.
License, 46.
Lien, 46, 106, 157, 279.
Lights, 46, 195, 279.
Life Insurance, 157.
Limitations, Statute of, 157, 195, 279.
Lunatic, 46, 196.

Maintenance, 157.
Malice, 46, 244.
Marriage, 106, 157.
Marriage Settlement, 46, 157, 244, 302.
Married Woman, 46, 106, 302.
Marshalling of Assets, 46, 106, 302.
Master, 158, 302.
Master and Servant, 46, 106, 158.
Merger, 158, 245.
Military Officer, 245.
Minister, 158.
Misdemeanor, 46, 158.
Misdescription, 302.
Misrepresentation, 158.
Mistake, 46, 106, 158.
Money had and received, 46, 106, 158, 302.
Mortgage, 46, 106, 158, 245, 302.
Mortmain, 158.
Mutual Credits, 107.

Name, 158, 245.
Navigable Waters, 47, 107, 158.
Necessaries, 245.
Negligence, 46, 107, 158, 245, 302.
Negotiable Instrument, 47.
New Assignment, 245.
New Trial, 158.
Next Friend, 245.
Non-Access, 302.
Non-User, 302.
Notary, 47.
Notice, 47, 107, 159, 245, 302.
Novation, 107, 245, 303.
Nuisance, 47.

Obstruction, 303.
Oyer and Terminer, 48.

Parent and Child, 159.
Parish, 159, 245.
Parliament, 48, 107.
Parties, 48, 159, 245.
Partition, 48, 159.
Partnership, 48, 107, 159.
Patent, 107, 159, 246.
Pawn, 48.
Payment, 48, 107, 159, 246.
Payment into Court, 48.
Penalty, 48.
Perils of tho Sea, 107.
Perjury, 159.
Perpetuity, 48, 107, 303.
Photograph, 159.
Pilot, 48, 107, 159.
Piracy, 246.
Pleading, 48, 108, 159, 246.
Pledge, 48, 108, 159, 246.
Power, 48, 108, 159, 246, 303.
Practice, 48, 108, 160, 247, 303.
Prerogative, 247.
Presumption, 49, 247.
Principal and Agent, 49, 108, 160, 247, 303.
Principal and Surety, 49, 160, 247.
Priority, 108, 160.
Privilege, 108.
Privileged Communication, 49, 108, 160, 247, 304.
Privity, 160 247.
Probable Cause, 304.
Production of Documents, 48, 108, 247, 304.
Promissory Note, 49, 108, 160.
Property, 160, 247.
Proximate Cause, 48, 108, 160, 247, 304.
Public Exhibition, 247.
Public Policy, 247.

Race, 160.
Racing Debt, 304.
Railway, 49, 108, 160, 247, 304.
Rape, 304.
Ratification, 49.
Realty or Personalty, 161.
Reasonable and Probable Cause, 304.
Rebellion, 49.
Receiver, 161, 304.
Recoupment, 108.
Redemption Suit, 248.
Reformation of Instruments, 161
Registration, 161.
Release, 248.
Remainder, 161, 304.
Remedy and Right, 248.
Remoteness, 304.
Rent, 49, 161.
Representation, 108, 304.
*Res Adjudicata*, 49, 161.
Residuary Clause, 304.
Restraint of Trade, 108, 248.
Resulting Trust, 161.
Retrospective Law, 161.
Reverter, 305.
Revivor, 49, 161, 305.
Revocation, 305.
Revocation of Will, 49, 108, 161
Right of Defence, 161.

Sale, 49, 108, 161, 305.
Salvage, 50, 161.
Scienter, 161.
Seal, 109.
Seaman, 50.
Security, 248.
Separate Property, 248, 305.
Separation Deed, 50, 161, 248.
Servant, 50.
Set-off, 109, 161.
Settlement, 50, 109, 162, 248, 305.
Sheriff, 248.
Shifting Use, 50, 248.
Ship, 50, 109, 162, 248, 305.
Slander, 50, 109, 162, 248.
Solicitor, 50, 162, 249.
Specific Performance, 109, 162, 249, 306.
Stamps, 109.
Statute, 50, 109, 162, 249, 306.
Statute of Frauds, 51, 109, 162, 306.
Statute of Limitations, 162, 249.
Stock Exchange, 51, 162.
Stop Order, 162.
Stoppage in Transitu, 162.
Subrogation, 51, 249.
Subterranean Waters, 51.
Succession Duty, 51, 162, 249.
Supplement Bill, 51.
Sunday, 306.
Support, 51.
Surety, 162, 249.
Surveyor, 249.

Tax, 162.
Telegraph, 162, 306.
Tenancy from Year to Year, 51.
Tenancy in Common, 51, 109, 163, 249.
Tenant for Life and Remainderman, 51, 110, 163.

Tender, 163, 249.
Title, 249, 306.
Tort, 249.
Towage, 306.
Trade Mark, 249.
Trade Secret, 249.
Trespass, 51, 249.
Trover, 110, 249.
Trust, 51, 110, 163, 249, 306.

Ultra Vires, 51, 163, 249, 306
Usage, 51.

Valued Policy, 249.
Vendor and Purchaser of Real Estate, 51, 110, 163, 249, 307.
Vendor's Lien, 51, 163.
Venire de Novo, 163.
Voluntary Association, 163.
Voluntary Conveyance, 52, 163, 249, 307.
Voter, 110.

Wager, 307.
Waiver, 249, 307.
Ward of Court, 52, 164.
Warehouseman, 249.
Warranty, 52, 110, 250, 307.
Watercourse, 52, 164.
Waste, 307.
Way, 52, 164, 250, 307.
Wife's Equity, 52, 110.
Wife's Separate Estate, 307.
Will, 52, 110, 164, 250, 307.
Winding up, 54, 165, 251.
Witness, 54, 111, 165, 251, 308.
Words, 54, 111, 165, 251, 308.
Writ of Error, 54.
Writ of Restitution, 54.

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## DIARY FOR JANUARY.

1. Sat.. *Circumcision.* Taxes to be computed from this date.
2. SUN. *2nd Sunday after Christmas.*
3. Mon. Municipal Elections. Heir and Devisee Court begins. County Court Term begins.
5. Wed. *Epiphany.*
8. Sat.. County Court Term ends. Last day for Township, Village and Town Clerk to make return to Conuty Clerk.
9. SUN. *1st Sunday after Epiphany.*
10. Mon. Election of Police Trustees in Police Villages.
12. Wed. Election of School Trustees.
15. Sat.. Treasurer and Cham. of Municipalities te make returns to Board of Auditors of School Rep. to be made to Local Superintendent.
16. SUN. *2nd Sunday after Epiphany.*
17. Mon. Members of Municipal Councils (except Counties) and Trustees of Police Villages to hold 1st meeting.
22. Sat.., Articlts, &c., to be left with Sec. Law Society.
23, SUN. *3rd Sunday after Epiphany.*
25. Tues. *Conversion of St. Paul.* 1st Meeting of County Councils.
28. Sat.. School Finance Report to Board of Auditors. Last day for Non-Residents to give list of their lands.
30. SUN. *4th Sunday after Epiphany.*

THE

# Canada Law Journal.

JANUARY, 1870.

## THE BENCHERS AND THE LAW SOCIETY.

A petition was circulated last year amongst the profession, asking for a change in the mode of appointing the Benchers of the Law Society, by making their appointment depend on the general vote of the Bar of Ontario. A bill was introduced in accordance with the views of the petitioners.

The sections which it is important to refer to at present are the following:—

"2. The Benchers of the Law Society shall be *thirty* in number, exclusive of the Attorney-General, for the time being, and retired Judge or Judges of the Superior Courts of Law or Equity for Ontario, who shall respectively, *ex officio*, be Benchers of the Law Society.

3. For the purpose of the election of the Benchers of the Law Society, this Province shall be deemed to be divided into the five districts following:—

One.—Comprising the Counties of Essex, Kent, Lambton, Middlesex, Elgin, Oxford, Huron, Perth, and Bruce.

Two.—Comprising the Counties of Wellington, Waterloo, Brant, Norfolk, Haldimand, Monck, Welland, Lincoln, Wentworth and Halton.

Three.—Comprising the Counties of Grey, Simcoe, Peel, York, Ontario, and the Districts of Algoma and Muskoka.

Four.—Comprising the Counties of Victoria, Durham, Peterboro', Northumberland, Hastings and Prince Edward.

Five.—Comprising the Counties of Frontenac, Lennox, Addington, Renfrew, Leeds, Lanark, Grenville, Dundas, Stormont, Glengarry, Prescott, Russell and Carleton; and the Districts may be termed respectively London, Hamilton, Toronto, Cobourg and Kingston.

4. For each of the said Districts, other than Toronto, there shall be elected by the members of the Bar usually resident and practising in the said Districts respectively, five members of the Bar, of at least [*seven*] years standing, and whether resident or practising in said respective districts or not, to be Benchers of the Law Society, and for the Toronto District there shall be similarly elected as Benchers ten members, members of the Bar in like standing.

11. The election of Benchers under this Act shall take place during the first week of the month of October, and the next subsequent election in the first week of October in the fifth year after the said first election, and so on."

This bill was thrown out last session on a technical ground, but as no opinion was expressed on the merits, it is likely that it will be again introduced, either in its present, or in a modified shape. It is therefore not out of place to refer to the measure as introduced last session, for upon the making of any such sweeping change as some contemplate, and upon the principle of the scheme some advocate depend consequences whether of good or evil to that Society to which we belong, and therein to the future injury or benefit of the profession, and incidentally and consequentially to the advantage or disadvantage of the public at large.

It was rumoured that the origin of the whole scheme was a personal matter, arising from want of temper on the part of some of the persons concerned, but of this we know nothing beyond the current report, nor do we desire to know anything more about it; the simple enquiry now is, not as to the motives which first prompted the desire for a change, (though perhaps, this might have considerable weight with many in inducing them to reject the scheme, or at least, make them more cautious in considering it)—but as to whether any such change as that proposed is in itself desirable.

It is a true saying that men in general are given to change, even for the very sake of a change; but Lord Bacon says, that no change in the law should be for change sake, but for the love of excellence, and that law reforms should be gradual and permanent. Whatever has been the reason, it cannot be denied that the idea of an alteration in the direction indicated, has become popular in certain localities. We confess however to a want of respect for popular clamour; and, without arrogating to ourselves the gift of prophecy, we venture to predict that there will, sooner or later, be a reaction in the minds of many; and this must necessarily be so unless the basis of the present fabric of popularity is founded, after careful consideration and deep thought, on sound reasons and unanswerable arguments in favour of the change.

That many professional gentlemen have signed this petition is quite possible. As we have said, it is "popular" in certain localities for the time being, but that the majority of the signers have thoroughly appreciated the effect of the proposed change, we very much doubt. Even putting it on no other ground, it is, as is well known, a matter of the smallest difficulty to get a given number of names to any petition bearing on its face a semblance of plausibility—one signs because another does—he does not like to appear singular—does not like to refuse—signing is less troublesome than giving reasons for refusing, the thing seems plausible and cannot hurt any one, at all events does not affect the signer, and so on; and all this is done, and an impression is given, without in reality obtaining the thoughtful well-considered sense of the signers of the petition, whatever it may be. Now in this case we do not say (simply because it has never been tested) that a majority of the profession are against the change, nor do we presume to say that many who have signed this petition, have done so without fully comprehending the subject in all its bearings, and with the conviction that the effect will be to cure defects, which either exist, or are supposed to exist (and for the sake of this argument whether they exist or not makes no difference), but we only argue that there is no evidence that there is any pressure for the Bill, (at least in its present shape,) and that the subject has not been brought before the profession in such a way as to enable the promoters of the Bill to say, that the voice of the profession is in favour of this, or any similar measure.

It will be doubtless admitted on all sides, that the Law Society should be so managed as to make it as conducive to the general advancement and welfare of the legal profession in Ontario, as circumstances will permit. To effect this it is obviously necessary that the best men that can be had from the ranks of the profession should be selected to conduct the affairs of the Society. Has then the present system worked well or badly with respect to the *personel* of the managers? Are the members of the Bench, selected under that system, entitled, from their means of useusefulness, business capacity, standing in the profession, position and general rectitude of character, to the confidence of those who can claim the protection, assistance and benefits of the Society; in other words, have the Benchers properly fulfilled the trust reposed in them by, up to the present time, electing as members of their body persons of the stamp alluded to. This is the first question. The next is, is there any reasonable ground for believing that a change, such as is proposed, would introduce a better class of men as Benchers, or otherwise better advance the desired object. And, finally, supposing as good men are secured for the position as at present, will the proposed new tenure of office conduce to the well-being or otherwise of the Society. And, to begin with, it may, we think, be laid down as attendant axioms to these problems, that, with the same men as Benchers (no matter in what mode they are appointed), the same results will follow, and that if a lower class of men are appointed worse results will follow.

The first question every enquirer can answer for himself, by merely looking at the list of those who have been appointed from time to time, and perhaps the fairest way would be to look at the selection during more recent years, when the field for choice has been more extended.

Then as to the second question, whether there is any reasonable ground for belief that the election of the Benchers in the manner proposed will advance the desired object. At present the Benchers select from the ranks of the profession, once every year, four gentlemen to be associated with them in their duties and position; so that it comes to this, that Benchers are now elected by a select few, and not by the mass of the profession. But it is argued and undoubtedly with some force, that in these days of responsible government and elective rights, it is not in accordance with the analogy of other institutions, and with the spirit of the age, that the governed should have no voice in the selection of their governors. This argument, so far as it goes, may for the purposes of this enquiry be admitted to be founded on a reasonable basis. But to give it any weight it must also appear as an established fact, that the governed desire a change, which shall place the appointment of their governors directly in their hands. As we have endeavoured to shew, there cannot, as yet, be said to have been any such expression of opinion; the petitions being, so to speak, *ex parte*, and, as such, valueless for any purpose whatever. And it must be conceded, that if the profession have not expressed a desire for a change, they must be presumed to be satisfied with the present system, and content that the power heretofore exercised by the few shall so continue, and as perfection can never be obtained, it may be because out of the two evils, they thus choose the least.

On looking over the law list, and comparing the names of the present Benchers with those from whom a selection can be made, one is inevitably led to the conclusion, that nearly all those who are not past work from age or ill health would probably be elected under the new system. Some few who are not "popular," in the worst sense of the word, would be left out, though perhaps amongst the best men that could be had for the position, and their place would be supplied by men less competent, but more "popular," younger or more pushing, as the case might be.

If the same men, or an equally good class are elected, of course no harm would be done, except the harm of introducing a system which is attended with so much of evil, and in this case, without, so far as any arguments have as yet proved, any compensating advantages. But the fear is, that a lower class of men will be elected. What has been the experience of years? Has it not been that the noisy, pushing and unscrupulous come to the front, leaving more really competent men in the background. Surely it is not in matters appertaining to the profession of the law that one would like to see the turmoil of an election, party spirit invoked, politics doubtless introduced, by and by ill-feeling engendered, and the nice feelings and instincts of those, who would not condescend to lower themselves by an appeal to others for support in such a contest, blunted.

If the present system is shewn to work badly, we will be amongst the first to applaud any well considered scheme that will make things better, or remove any well-grounded causes of complaint, but we cannot support a measure which not only is not shewn to be necessary, but bears on its face the elements of discord and destruction. It is not our business to advocate the interests of the present or any former Benchers of the Law Society, and we do not now pretend to do so; they are perfectly competent to fight their own battles. But we cannot, even as a mere matter of justice, allow it to be said or even insinuated that the present Benchers have done nothing to give us confidence in the present system; to speak of nothing else, they have inaugurated a course of legal education, probably superior to that of any other country in the world. This is something to be proud of, and let those who have done the work get their share of credit for what they have done, as well as blame for what they may have left undone. A system that has produced such good fruit in such an important matter must not be lightly interfered with. Would as much have been done by men appointed for a few years, not knowing whether at the end of one period whether they would be in office the next year to carry out to completion what they might have commenced? We much doubt it. And here it is but right to pay a passing tribute to the zeal and talent of the indefatigable Treasurer of the Law Society, to whose sagacity, the admirable measures alluded to are mainly due. He has worked early and late, devoting his great business talents and much of his valuable time to the work of the Society, and, like the rest of the Benchers, without the slightest remuneration; doing more than those who are not familiar with Osgoode Hall are aware of. We hope, for the sake of the Society, he may long hold his present position.

A host of objections present themselves to the Bill as introduced, but to which we have not at present space to refer; but we shall probably have occasion to speak of this subject again. Without having as yet stated half the objections to this Bill, we may at least have suggested to some, that this question, like others, has two sides to it, and we shall, for the present, be satisfied if we have caused any of the promoters of the scheme, to pause and consider more carefully its probable results.

## THE NEW CHANCERY JUDGES.

The recent appointment of Mr. Spragge to the Chancellorship, and Mr. Strong to the seat vacated by Mr. Spragge's promotion, will give great satisfaction. The present Chancellor has risen step by step to his present high position, and none will grudge him his well-earned honors. The hopes of his many friends that his services would not be overlooked on the first available occasion have not been disappointed, and amongst the profession the elevation of this able, conscientious and most pains-taking judge — a man who has deservedly won the respect and regard of all—meets with general and hearty approval.

The new Vice-Chancellor has established a reputation second to none as an equity counsel; and the Equity Bench, as well as the Court of Appeal, will be greatly strengthened by the learning and talent that he will add to them.

The Chancellor took his oath of office at Ottawa, but Mr. Strong was sworn in at Osgoode Hall. The Bar was largely represented, and after the formal part of the proceedings were concluded, Hon. J. H. Cameron, Q.C., on behalf of the profession (we copy from one of the daily papers),

"Offered the congratulations of the bar to the Chancellor. He said that if anything could lessen the pain felt at loss of the able and well-beloved man who had last filled the high office of Chancellor so well, it would be the wisely and well-ordered action of the government in the choice of his successor. It gave him (Mr. Cameron) particular pleasure to be the medium of conveying the expresson of the Bar's feeling towards his Lordship. There was no member of the Bar who had had so long and intimate acquaintance of his Lordship's career. He (Mr. Cameron) had been first his Lordship's student, then his partner, and lastly a practitioner in his court—his whole acquaintance extending over half the time allotted to man. He could, therefore, well appreciate the high qualities of his Lordship, and know how well and honorably he had performed his duties. He cordially joined in the wish which he offered on behalf of the Bar, that his Lordship might live long and happily to enjoy the office to which he had been appointed and which he was so competent to fill. Mr. Cameron, addressing Vice-Chancellor Strong, also tendered the warmest congratulations of the profession. The Chancellor had been so long in an official position, that there were few members of the bar who could remember him at the Bar. Mr. Strong, however, was fresh from the legal arena and its contests, and so seemed nearer to the profession. He considered that the Bench had a material assistance in the appointment of a Judge who was in the full vigor of manhood, and eminently in the possession of mental and physical strength. He hoped the Vice-Chancellor would long live to to enjoy his new dignity.

The Chancellor briefly returned thanks, saying that he could not make a return in set words and phrases, as the congratulations of the Bar had taken him by surprise. His Lordship then referred in touching terms to the worth and talent, the kindly heart, and amiable qualities of the late Chancellor. He said he trusted he would receive assistance from his colleagues in the discharge of his important and onerous duties, and then expressed the admiration he had always felt for the Bar of Ontario—in which could be found legal talent of which any nation might feel a just pride.

Mr. V. C. Strong also returned thanks for the expression of good will towards himself, and hoped that the same would continue. There could be nothing more assuring to a Judge entering upon his duties than such manifestations as the present. He should always conserve the privileges of the Bar, feeling that thereby he was best securing the ends of Justice."

# SELECTIONS.

## THE ALABAMA CLAIMS.

What are the "Alabama claims?" If the case of the *United States of America* v. *Great Britain* were now before some tribunal of competent jurisdiction, what are the precise claims that we should make, on what grounds should we urge them, and what award should we reasonably and fairly expect from an intelligent arbitrator? The failure of the recent attempt at negotiation having set the whole subject once more afloat, it is well to consider where we stand, and what is the next thing to be done. No one can suppose that a claim so large in amount, and so well founded in justice, can be waived or abandoned on our part.

It is very frequently said, that, in the present condition of thecase, there is no occasion for us to do any thing at all; and this suggestion is usually received with great favor, as if it embodied a large amount of practical wisdom. We are usually told that our claim is one that will "keep;" that England has established a precedent that we can follow hereafter with much advantage to ourselves, and much inconvenience to her; that, in effect, we have put her under heavy bonds to keep the peace, and be of good behavior towards all the world; that, if ever she should venture into a war with any other power, we can cover the ocean with Alabamas, and fearfully retaliate upon her the wrong that she has done us. This is equivalent to saying that the question between the two nations, which has already produced so much exasperation on both sides, and which involves such large pecuniary interests, is never to be settled at all; that we are sullenly to wait an indefinite, and perhaps a very long time, for "something to turn up," as Mr. Micawber would say, which shall give us an opportunity, not for indemnity, but for revenge, and that in the mean time the actual sufferers by the depredations complained of—the merchants whose property was burnt, and the insurers who have paid losses—are to be left to the full enjoyment of the right of petition for relief from the national treasury. But this expectant system, though received with some applause when first suggested, is not likely on the whole to be satisfactory to the country. None but the head centre of some Fenian lodge would deny that a just and honorable settlement is better than any further postponement.

As we occupy the position of plaintiffs in this matter, we are of course to go forward, to state distinctly what our claims are, and on what grounds we undertake to maintain them. And, first of all, we are to bear in mind that our claim is against the British government for its *own* sins of omission or commission. This is a matter in which we can deal only with that government. So far as we have been injured by the reckless and unlawful acts of British subjects, perpetrated under such circumstances as to furnish no ground for charging that government with expressly or impliedly authorizing, permitting, or conniving at the wrong complained of, we do not seek to call it to account. For that reason, it has never occurred to any one, not even to Mr. Sumner, to claim that the British government is to be held responsible for the manifold inconveniences produced by the almost constant evasions of our blockade of the Southern ports. There is no kind of doubt that the activity and success of the blockade runners prolonged the war for years. It would have been impossible, but for them, for the Confederacy to have maintained the contest for a single year. In regard to them, we neither had nor claimed any right from that government, except that it should leave them to take the chances of capture and confiscation. In regard to them, we have never charged that government with any complicity in the mischief, and their doings make no part of our claims against England. They were tempted by the prospect of enormous profits to run the risk of capture, and in this commercial age it has hardly occurred to any one that it was a matter of resentment, even against the blockade runners themselves.

The first item of our claim against the British government is one about which *we* need little argument, and which is not very seriously controverted anywhere, viz., the pecuniary claim; the damages demanded for losses incurred and depredations committed, directly resulting from, and occasioned by, the failure of England honestly and faithfully to fulfil the obligations of neutrality. Mr. Sumner insists that this is not the real question between the two nations, but even he will hardly deny that it enters into it, and makes a part of it. It is *one* of the things to be settled and adjusted, and it is important to consider upon what principles this part of our case is to be urged.

So far as this item is concerned, the claim can be computed, adjudicated upon, and paid, in pounds shillings, and pence. All this is a peculiarly proper subject for arbitration, and we, on our part, can have no hesitation or scruple in binding ourselves to submit to the award. We are fully prepared, as we think, to satisfy any impartial arbitrator, that, upon this point at least, we have an unanswerable case. It is hardly denied on the floor of Parliament that there was something approaching to neglect of duty on the part of the officials at Liverpool, at least in permitting the escape of the Alabama. We cannot reasonably complain that the same commission which passes upon our individual claims against England, is also to audit and examine the individual claims of British subjects against our own government. It is a little extraordinary that Mr. Sumner should object to the treaty on the ground that, in providing for individual claims on the part of our citizens, it makes them "subject to a set-off from the individual claims of England, so that, in the end, our country may possibly receive nothing." It would be strange if it did not. What sort of an arbitration would it be that provides that the claims of the plaintiff shall be heard and investigated, and that the claims of the defendant shall not be heard? Is not an account in set-off a good defence as far as it goes, and as far as it is proved? How can he say that, in the end, our country will receive nothing, if all our claims are allowed and charged against England in the general account current between her and our own country? Each country makes its claim in behalf, and in the right, of such of its own citizens as have been sufferers by the misconduct of the other. One of the objects of the proposed arbitration is to ascertain how much England owes, for depredations and losses, to our merchants, Certainly, there is no injustice in inquiring at the same time, and upon the same principles, how much (if any thing) this country owes for mistakes in seizures and confiscations, to British merchants. Mr. Sumner, surely, does not suppose that in the very improbable event of so large a set-off as to leave a very small balance, or no balance at all, in our favor, our Government can say to the merchants, in whose behalf it claims, that nothing has been recovered. Can our government charge these claims against England, and have them allowed, and then refuse to pay them over to the losers?

The next item of claim on our part would seem to be certainly more remote, or consequential damages, or what may be called the indirect losses, growing out of the same cause. The mere value of shipping and cargoes actually destroyed was but a part, and probably but a small part, of the injury to our commerce. A hostile steamer, fitted out with all the appliances of modern skill and science, roving about the Atlantic and along the great highways of commerce, her crew consisting of "gunners from the Excellent," herself finding enthusiastic friends and admirers in every British port; applauded, encouraged, and welcomed by every British colonial governor from Halifax to the Cape of Good Hope, and from the Cape of Good Hope to Australia, eagerly and promptly furnished with supplies, repairs, coals, and recruits, wherever British authority was established, and could reach out its hand to her,—such an enemy was, formidable, indeed. The fact that there were many such cruisers upon the sees, and that they had found such exceeding favour everywhere in the eyes of John Bull, was almost enough to substantially sweep our commerce from the ocean. The loss of profits, the difficulty of procuring insurance, the abandonment of contemplated voyages, and the very general transfer of our tonnage into foreign hands, threw us a long way behind, in the competition with other countries, for the carrying trade of the world, and inflicted upon us an immense national loss. But if we were to bring forward this great national loss as a matter of pecuniary claim, we should certainly find ourselves embarrassed with certain well-established, and not wholly pedantic rules, familiar to the courts of law, as to remote and proximate causes of damage. The merchant, whose ship and cargo have been burnt on the high sees, has a claim for damages that admits of precise and definite computation. It can be expressed, and exact compensation can be made, in coined money of the realm. But a merchant who keeps his ships and cargo at home, for fear they may be burnt; the merchant who sells his ship, because it is unsafe to use her himself,—such a merchant may have taken very prudent precautions, and may be a decided loser; but can it be said that the damage which he has suffered was the direct and necessary consequence, the immediate result, of the breach of neutrality on the part of the British government? The decline of national commerce, the expense and inconvenience of convoys, the frequent and expensive search and pursuit after the rovers, enter into the sum total of the national loss, but none of them are elements which enter into a claim for pecuniary indemnity. According to well established legal principles, our claim, so far as it is merely of a pecuniary character, must be confined to losses by actual depredations. In an action against the worthy Captain Semmes himself, supposing him to be before a competent court, and able to respond, with all his demurrers and dilatory pleas overruled, we could hardly claim to hold him responsible in damages for any thing but the direct and proximate consequences of his acts. The expense incurred in trying to keep out of his way, would not be a matter of judicial consideration.

Such, then, being the extent of our pecuniary claim on the British government (for it cannot be too distinctly borne in mind that our claim is not against the British public at large), what is the next item? Much has been said, and much will continue to be said, of the hasty and unseasonable concession to to our insurgents, or belligerent rights. It was to them, perhaps, a very valuable and important concession, but it is to be remembered that this recognition of a mere fact must have come at last. They certainly were belligerents in the summer of the year 1861, if they had not become so in May of that same year. The recognition on the part of England may have been an unfriendly and discourteous act, but how could it be called a violation of our rights? It was a matter in which, perhaps, a decent regard for international civilities would have justified and perhaps may be said to have required some delay; and perhaps they should at least have waited until our minister, then on his way to England, had arrived. But the most that we can say is, that it was premature, and that the ministry ought to have waited for official information from our own government. It may possibly be true, as Mr. Bemis insists, that their reliance on our proclamation of the blockade, as a justification, was an afterthought. But long before this concession of belligerent rights, much had been done on our side of the Atlantic that indicated but too plainly what was coming. State after State had formally withdrawn itself from the Union, so far as such a withdrawal can be accomplished by mere legislation and by vote. State after State had disowned and excluded from its limits every shadow and vestige of the Federal authority. They had organized a new confederation, had formed a new government, so far as all this could be done on paper, and had raised armies. In April they struck their first blow, and all the world now acknowledged that that first blow was the beginning, not of a riot or a skirmish, but of what certainly may be called a civil war, if ever there was such a thing as a war. Before that first blow was struck, the whole world saw that war was coming, and was close at hand. The British government eagerly, and joyfully perhaps, declared, on the 6th day of May, 1861, that it had come. And the event has shown that their declaration was true as a matter of fact. But even if it had not proved true in point of fact, it would have been no violation of any international right. It might have been a great breach of decorum, or a great national insult; but whether civil or uncivil, friendly or unfriendly, considerate or hasty, it was an act entirely within their own discretion to do or not as they pleased.

We on our part might have resented it by an instant declaration of war; but when it comes up for consideration long afterwards, as a matter of national complaint, it must be viewed with more calmness. If our insurrection had in fact proved to be a mere riot which had been suppressed by our civil authorities, the belligerent rights conceded to the insurgents would have been only an expression of ill-will against us, of as little practical importance perhaps as our own recognition of Hungary, some years ago, not merely as a belligerent, but as a nation. The concession of belligerent rights to our insurgents was not the cause of the fitting out of the privateers. They were not fitted out till long after the war had become a perfectly established fact, recognized as such by the whole civilized world.

This item in one list of grievances is usually spoken of as the climax of all injuries,—the crowning wrong and indignity that no merely human patience could be expected tamely to endure. Mr. Sumner denounces the declaration of neutrality as a declaration of equality between our national government and the rebel "slavemongers;" as an insult to our government; as a "moral absurdity,—offensive to reason and to all those precedents which makes the glory of the British name." Is there not some slight confusion of ideas in this view of the case? All that we had any legal right to demand of England was a strict and impartial neutrality;—and the sum and substance of all our complaints against her government is simply that she did not faithfully fulfil that obligation. The Queen's Proclamation of neutrality can hardly be said to have been intrinsically wrongful and offensive of itself. It was a warning and command to her subjects to do the very thing that we insist they were bound to do, and the very thing and only thing which we had a *right* to insist that they should do. The fact that the rebels were "slavemongers" (to use the classical expression of Mr. Sumner) has nothing to do with the matter. So far as the obligation of neutrality was concerned, England placed both combatant parties upon equal ground. If she had done otherwise, it would not have been neutrality; if any thing in the time and manner of issuing the proclamation justifies us in saying that it was a premature concession, "a hasty recognition," we may have had cause to take offence: but it is difficult to conceive how it can be made the subject of a treaty. It cannot be paid for in money; it is too late now to resent it by a declaration of war; it is sheer absurdity to talk of retraction or apology. There is absolutely nothing that we can ask the British government to do about it,—and it is impossible to understand what Mr. Sumner proposes that we should do as to this (as he seems to consider it) most important item in our list of wrongs.

By far the greatest part of the wrong which England inflicted upon us during our late struggle, is one which money cannot pay for, and which no treaty can adjust. When our rebellion, unprovoked and unreasonable as we considered it, first broke out, we flattered ourselves that we were upholding lawful authority against revolutionary violence and disorganization; that the world generally would understand that our disturbances had their origin in the domestic conflict of opinion in this country on the subject of slavery: that it was also universally known that the entire secession movement was in the interest of slavery as a permanent and dominant national interest; and that although, from our position, we claimed only to uphold and maintain the Constitution, and the existence and authority of the Union under it, and so were not at liberty directly to assail slavery in its local strongholds, we at the North at least deplored its existence, and would be glad to witness its downfall. We supposed that England also was sincerely, and on principle, a foe to slavery; but we were not at all prepared for the discovery that she was a thousand times more a foe to democracy. Nothing could have been more dismal and overwhelming than our disappointment at finding that all the sympathies of the British public and all the moral weight of British opinion were on the side of our foes. Of course, it was no matter of surprise that a large portion of the people of Great Britain, imperfectly informed of the merits of the case, and perhaps caring about them but little, should have bestowed their applause and sympathy upon the party which seemed numerically the weaker, yet defended its cause with such spirit, and with such a brilliant promise of success. But the difficulty lay much deeper. The cry everywhere throughout the kingdom was that the great republic had broken down, and all England clapped its hands with delight. England rejoiced and triumphed at the prospect of our downfall without reserve and without disguise. We were everywhere denounced as mere wrongdoers. Our efforts to defend our Union and preserve our nationality were stigmatized everywhere as unjustifiable and unchristian obstinacy, in prolonging a hopeless and meaningless, and for that reason a brutal and inhuman war. There was not a word of encouragement or sympathy for us (with a very few honourable exceptions) from the periodical press—from the peerage—from parliament—the clergy—the army—the navy—or the commercial classes. Bankers hastened to lend their money to the rebels, and the confederate loan was current on the London Exchange at a higher rate than that of the United States. So far as the public opinion of a country can be expressed in any mode intelligible to other nations, it was with substantial unanimity against us, and in favour of our enemies. The whole moral weight of England was upon the side of the Confederates; and she did about all she could, short of actually declaring war against the United States, to help them gain the victory over us.

But all these things, offensive, injurious, and insulting as they were, have very little to do with any international claims or grievances that can be made the subject of a negotiation or arbitration. They show that the state of public opinion in England was all wrong; but we do not claim to call the government of that country to account for errors of that kind. We have happily passed the point of time when the mistaken public sentiment of Great Britain gave us any cause for alarm. The only point of view in which it is now a matter of any practical importance, is, that it throws some light upon the *animus* which inspired their languid and feeble efforts to prevent the escape of the Alabama from the port of Liverpool. It is not at all strange, in in such a state of public sentiment, that the official telegram to Liverpool for the arrest of that vessel should unluckily fail to arrive till after office hours on a Saturday afternoon. It throws some light upon Lord Russell's insolent inquiry, addressed to Mr. Adams, whether it is common in America to arrest a vessel on a charge of an intended breach of neutral law without proof. The victorious conclusion of our great contest is a sufficient answer to all cavils, to all reproaches and insults; to all the shouts of triumph over our anticipated downfall. We can bear, without a murmur, the recollection that we had not a single friend upon the bench of bishops, and that respectable bankers invested in the confederate loan. We were willing that the high church-and-state tory should dislike our institutions, if he should feel so inclined, and should speak of them in any terms that he may happen to choose. But there is a portion of the matter in dispute between the two nations which admits of being made the subject of a treaty, and which can be settled by arbitration. It is no sufficient reason for refusing to go so far, by treaty and by arbitration on fair and equitable principles, that there were also certain other unpleasant matters which are not the subjects of a negotiation, and do not admit of being disposed of by treaty. It is something, that, so far as the claim for damages is concerned, Great Britain, to use a phrase often heard in the New England court-houses, has offered "to leave it out to men,"—to submit the question to a fair and impartial arbitrator. Payment of the money under such circumstances would be an acknowledgment of the wrong, and apparently all the practical reparation for it that can be made. The offer to submit to arbitration is very little, if at all, short of it.

The position in which England stands at this moment is substantially this: She offers to make full reparation for all actual spoliations committed in violation of her neutral obligations, resulting from the want of suitable and proper legal provision for enforcing those obligations upon her subjects, or from the inadequate administration of such law in that behalf as was in existence; she has also invited us to join her in such new legislation, as to the duties of neutrals, as experience has shown to be needful. Under the circumstances, what more ought we to demand? and what other basis of negotiation does the nature of the case admit of?—*American Law Magazine.*

## MR. JUSTICE HAYS.

It is with extreme regret that we record the death of Mr. Justice Hayes, who expired on Wednesday night. On Friday Sir G. Hayes was in court, and apparently in his usual heath. He heard a summons in his private room, and was leaving for his home at Esher when he was seized with what at first was supposed to be paralysis or apoplexy. He scarcely rallied at all, and died at Westminster Palace Hotel, to which he had been removed after the seizure. Sir G. Hayes was educated at Highgate and the Roman Catholic College at Ware, Herts. He was called to the Bar at the Middle Temple in 1830, received the coif in 1856, and in 1860 was granted a patent of precedence to rank next after Mr. A. J. Stephens, Q. C.. Not long after this he became Recorder of Leicester. He was the leader of the old Midland Circuit, but under the rearranged circuit gave way to Mr. Overend, Q.C. When three new Common Law Judges were appointed under the Parliamentary Elections Act, 1868, Serjeant Hayes became a Justice of the Queen's Bench. It is not too much to say that no judicial appointment ever gave more general satisfaction. Serjeant Hayes was the most genial and popular of men, both on his circuit and off it. In addition to this he was a scholar and a sound lawyer. As a humorist he had few equals. To describe him as an habitual joker would be an utter inaccuracy; his wit was of the character indicated in Mr. Henry Taylor's assertion, that a truly humorous mind is always a grave one,—an assertion, indeed, which amounts to a truism. The late judge never took any active part in politics. He married in 1839 a Miss Hale, of Leicester, by whom he leaves a family of four sons and a daughter. The cause of his death proved to be the rupture of a blood vessel in the brain.—*Solicitors' Journal.*

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Once Bishop Horsely met Lord Thurlow walking with the Prince of Wales The Bishop said he was to preach a charity sermon next Sunday, and hoped to have the honor of seeing his Royal Highness present. The Prince intimated that he would be present. Turning to Thurlow, the Bishop said, "I hope I shall also see your lordship there," "I'll be —— if you do; I hear you talk nonsense enough in the House of Lords; but there I can and do contradict you, and I'll be —— if I go to hear you where I can't"—*Bench and Bar.*

## ONTARIO REPORTS.

## COMMON LAW CHAMBERS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Royal Canadian Bank v. Matheson.

*Insolvent Act of 1864—Sec. 3, clause c—Affidavit.*

*Held*, 1. That a sale by a debtor for full consideration to a *bona fide* purchaser cannot render his estate liable to compulsory liquidation under above section merely because he declines to pay the proceeds to one of his creditors, though coupled with subsequent circumstances tending to raise a suspicion of the *bona fides* of his disposal of such money.

2. Affidavits to found an attachment should definitely charge the act of insolvency relied upon.

*Semble*, that no conveyance which is in itself an act of insolvency can be upheld as valid in favor of any party to it.

[Chambers, November 8, 1869.]

This was an appeal from the judgment of the judge of the county of Oxford setting aside a writ of attachment sued out by the Royal Canadian Bank against John Matheson. The writ of attachment was obtained on the affidavits of Mr. Burns, agent of the plaintiffs at the town of Woodstock, and of Mr. Ashton Fletcher of the same place, solicitor for the plaintiffs These affidavits shewed that the defendant was indebted to the plaintiffs in the sum of eighteen hundred and thirty-eight dollars, on two bills of exchange, drawn by one Malcolm McKinnon, and accepted by the defendant. The affidavits were so far similar that it is unnecessary to cite them both. The following is an extract from that made by Mr. Burns. After swearing to the amount and origin of the claim, the deponent proceeded as follows:—

To the best of my knowledge and belief, the defendant is insolvent within the meaning of the Insolvent Act of 1864, and has rendered himself liable to have his estate placed in compulsory liquidation under the above act, and my reasons for so believing are as follows:

That the defendant has always, since maturity of the first bill above-mentioned, informed me that he had no property except his house in the town of Woodstock, and that he would sell the same and pay the amount of the plaintiff's claim, and has fixed different times for so doing, all of which have passed.

Some time ago, and within three months, the defendant told me, that he had arranged a sale of the said house to one Mrs. Dunbar, and as soon as she paid the money for the same that he would pay up the plaintiff's claim.

On the twenty-second instant, the defendant came into the office of the bank and told me that he had got sixteen hundred dollars on the said house, that he had given to his wife one thousand dollars to induce her to bar her dower, and had nine hundred dollars in his pocket, but that he would not pay the same unless I would release the whole of the bank's claim, and give up both the said bills of exchange on receiving the said nine hundred dollars.

I requested him to pay the same on account, offering to give time for the balance.

From these facts and circumstances I have been led to believe, and verily do believe, that the defendant has within a few days past assigned or disposed of his property, or has attempted to assign or dispose of his property with the intent to defeat or delay his creditors, or the plaintiff."

The affidavit of Mr. Fletcher concluded in the same words, which, in fact, are a transcript of clause *c*, of sec. 3 of the Insolvent Act of 1864, omitting any reference to a removal of property which in the present case would be inapplicable.

Upon the facts set forth in these affidavits, the attachment in question was issued on 29th July, 1869, and was served on the defendant on the 2nd of August. The petition of the defendant to set aside the attachment was duly presented to the judge of the county court, supported by an affidavit of the defendant in which, among other things, he stated that he believes that he has not rendered himself liable to have his estate placed in compulsory liquidation; that the papers attached to his affidavit contain true statements of his liabilities and assets; that before selling his house and premises he informed the agent of the plaintiffs of his intention to do so; and that he sold the same for the express purpose of enabling him to pay all his liabilities in full; and that he did not sell the said property with intent to delay or defraud his creditors or any of them; that he had duly received $1000 of the purchase money; that his wife positively refused to bar her dower unless $1000 were paid to her; that the solicitors of the purchaser (Mrs. Dunbar) advised her not to purchase the property unless the wife's dower was barred; and that he was forced to consent to this payment being made, and that the same never came into his hands; that certain improvements are to be made by him, upon the completion of which the balance of the purchase money is to be paid to him, and will amount at least to the sum of $850. There were then several statements made respecting the origin of the plaintiff's claim and other matters, which, as they do not affect the decision of the present appeal are omitted, and the affidavit concluded with a denial of any intention to abscond, or that he had assigned, removed, or disposed of his property with intent to defraud, defeat, or delay his creditors, or any of them, &c., &c. The papers alluded to in the foregoing affidavit shewed that the liabilities of the defendant amounted to $1001.52, exclusive of plaintiff's claim, or including that to the sum of $2831.52; while the assets, including the $850 to be paid by Mrs. Dunbar, amount to $3918; in other words, that exclusive of the plaintiff's claim, the defendant is possessed of nearly four times the amount of his liabilities, and that including it he has $1000 over and above his debts. There were affidavits from Mr. Burns and Mr. Fletcher in reply, but the learned judge did not think them to be of much consequence to the decision of the point in dispute.

The case was first argued before the judge of the county court, D. S. McQueen, Esquire, whose judgment was as follows:—

"The words descriptive of an act of bankruptcy in clause c of the 3rd section of our Insolvent Act are similar, and a mere repetition in substance of section 3 of the Imperial Act, 6 Geo. IV. c. 16

I take it then, that the rule of law and the construction of those enactments as affecting the commercial interests of the county must be the same in all cases coming within them.

That being so I see no difficulty in the way, on considering authorities, of coming to the conclusion, that, in this, as well as every other case, in order to render the estate of a party subject to compulsory liquidation under the clause in question, several circumstances must concur: 1st, the transfer must be fraudulent; 2nd, there must be an intention to defeat and delay creditors; and 3rd, the buyer must know, or, from the very nature of the transaction must be taken necessarily to know that the object was to defeat and delay creditors: *Hill* v. *Farnell*, 9 B. & C. 45; *Harwood* v. *Bartlett*, 6 Bing. N. C. 61; *Baxter* v. *Pritchard*, 3 N. & M. 638; *In re Colemere*, 13 L T. N.S. 621; *Sharp and Secord* v. *Mathews*, 5 P. R 10.

Was there then such a concurrence of circumstances in this case as would shew that the sale of the defendant's house and lot in Woodstock was fraudulent so as to constitute an act of bankruptcy? I think not. It was not contended on the argument that the sale was not *bona fide* and for value; and the affidavits upon which the application for the attachment rests do not aim at impeaching the transaction on the ground of fraud or want of consideration.

The sale, then, being *bona fide* and for value cannot be tortured into an act of bankruptcy merely because the defendant did not pay over to the plaintiffs the amount of the purchase money as they were lead or seemed to expect he would, on the sale, in discharge of their claim against him.

*Baxter* v. *Pritchard* is an express authority on this point. There it was held that an assignment by a trader of his whole stock with intent to abscond and carry off the purchase money was not an act of bankruptcy, as a fraudulent transfer and delivery of his property with intent to defeat and delay his creditors, as the purchaser paid a fair price for the goods and was ignorant of the trader's design.

But the plaintiffs contend, without impeaching or attempting to impeach the sale or deed of conveyance of the property, that his subsequent conduct with regard to the purchase money shewed that the sale was for the purpose of delaying and defeating creditors, and therefore an act of bankruptcy.

With regard to this doctrine, the Lord Chancellor (Cranworth), in *Colemere and Colemere*, 13 L. J. N. S. 623, says: 'That I cannot understand, because, if the deed is impeachable it can only be impeachable so as to constitute an act of bankruptcy because it is fraudulent. But if it is fraudulent the deed is void. It will not be an act of bankruptcy because the person who receives (erroneously reported, *gives*) the money has it in contemplation probably to deal with the money in some way that may constitute an act of bankruptcy. That is not what can be looked to in considering whether the deeditself is fraudulent. The deed itself, if fraudulent, would be impeachable If not impeachable, it is not an act of bankruptcy.'

Then on the merits, the defendant, in his affidavit annexed to the petition to set aside the writ of attachment, swears that he sold the property for the express purpose of enabling him to pay off his liabilities in full; that before he sold it he informed Mr. Burns of his intention to do so; that he did not sell it to defeat or defraud his creditors, or any of them; that he disputes and intends to dispute his liability to the plaintiffs in this case; that he is not insolvent; and he then swears to statements of assets and liabilities, which shew an amount of assets in excess of his liabilities, inclusive of the disputed claim of plaintiffs to the amount of $1087 98.

Upon the whole, considering and acting upon the evidence adduced, I can see nothing to lead to the belief that the defendant has made a fraudulent disposition of his property, or, to shew that his estate has become subject to compulsory liquidation. I think therefore that the prayer of the defendant's petition must be granted.

This decision, upon the advice given, will, no doubt, be appealed from; and, if erroneous, will be corrected. It is a great satisfaction to know, that in such important matters the decision is not conclusive upon the parties. The judge or court appealed to will have, however, an advantage, inaccessible to me on the argument, of hearing this case and *Colemere* v. *Colemere*, distinguished."

On the argument in chambers, on the appeal from the above decision of the learned judge of the county court.

*R. A. Harrison*, Q.C., appeared for appellant.

*J. A Boyd*, contra.

Galt, J.—The authorities principally relied upon by the learned judge in his very able and carefully considered judgment are, *In re Colemere*, L. R. 1 Ch. Appeal 128, and the cases cited therein, and *Sharp & Secord* v. *Robert Matthews*, 5 Prac. R 10, decided by Mr. Justice Gwynne. Upon the argument before me, Mr. Harrison, counsel for the appellants, endeavoured to distinguish this case from *In re Colemere*, on the ground, that in the 3rd sec. of 6 Geo. IV. ch. 16, the word "fraudulent" is used, which is wanting in our Insolvency Act of 1864, sec. 3 sub-sec. c. Mr. Boyd, for the defendant, supported the judgment of the learned judge, and in addition, objected that the affidavits on which the attachment was issued were defective for uncertainty, and that they were so vague that it was impossible to say positively what was the act of bankruptcy on which the plaintiffs relied.

I am of opinion that the judgment of the learned judge is correct, and I cannot agree with Mr. Harrison's argument, that a sale made for a full consideration, and to a *bona fide* purchaser (which is not disputed in this case), should, under the provisions of our act, render the vendor's estate liable to compulsory liquidation, because, for some reason or other, he declines paying over the proceeds to some one of his creditors, although he may have ample means to satisfy all claims against him, as is positively sworn to in this case. The case of *Sharp* v. *Matthews*, to which reference has been made, is a stronger case in its circumstances than this, and is an authority in favour of the defendant. Mr. Harrison was obliged to contend in order to distinguish this case from *In re Colemere*, that in this Province, under the peculiar wording of our act, a deed might be valid *quoad* the purchaser, but an act of bankruptcy on the part of the seller It appears to me, on the contrary, that no conveyance, which itself is the act of bankruptcy relied upon, can be valid in favour of any party to it if the bankruptcy is upheld.

As regards the objection to the affidavits. I am of opinion that it is entitled to prevail, and that the affidavits in this case are insufficient. It is impossible to say whether the plaintffs complain of an act, or an attempt to commit an act, and when we consider how essential it is to a party to know exactly with what he is charged, as the consequences to him are so penal, I think that the rule laid down in Chitty on Criminal Law, Vol. 1, p. 280, which is as follows:—"Another general rule relative to the mode of stating the offence is, that it must not be stated in the disjunctive, so as to leave it uncertain what is really intended to be relied upon as the accusation"—should be followed in cases of this description, and that an affidavit should state positively the act relied upon as constituting the act of bankruptcy.

The appeal therefore is dismissed with costs.*

## Macklem v. Durrant.

*Witness—Privilege from arrest.*

A witness is privileged from arrest whilst returning home after giving his evidence, and he does not lose his privilege by staying a night at the house of a friend, some distance from the place of trial, to refresh himself, if he uses reasonable expedition to return home.

[Chambers, Nov. 3, 1869.]

The defendant, who was indebted to the plaintiff, went to Michigan to reside. He subsequently returned to this country, to give evidence at a trial which took place at St. Thomas. After the trial was over, it being then too late to start for home that evening, except he went by the night train, he went to a friend's house to stay the night. To do this he had to go a few miles from the place of trial and out of the direct route homewards. He went to the station the next morning to take the first train towards his home, but was arrested on a *capias*, at the instance of the plaintiff.

*J. A. Boyd* thereupon obtained a summons to set aside this arrest, as being a breach of the defendant's privilege as a witness.

*R. A. Harrison*, Q. C., shewed cause.—The defendant deviated from his direct route towards home, and thereby lost his privilege: *Spencer* v. *Newton*, 6 A. & E., 623.

*J. A. Boyd*, contra.—There was no deviation. The defendant did not go out of his way on his return home; he merely went to spend the night at the house of a friend, instead of staying at an Inn, or travelling all night, and, he was at the station ready to take the first train the next morning: see *Pitt* v. *Coombs*, 5 B. & Ad. 1078; *Hatch* v. *Blissett*, Gilbert's cases, 808; Bacon's Abridgment, "Privilege;" *Meekin* v. *Smith*, 1 H. Bl. 636; *Lightfoot* v. *Cameron*, 2 W. Bl. 1113; *Webb* v. *Taylor*, 1 D. & L. 684; *Willingham* v. *Matthews*, 2 Marsh. 59; *Selby* v. *Hill*, 1 Dowl. 257, 8 Bing. 166.

Galt, J., during the argument said, that unless the rule laid down in the case cited from Gilbert's Reports was no longer law, the defendant's contention must prevail.

After deliberation the summons was made absolute, the judge remarking, that the defendant had used reasonable expedition in preparing to return home. He was not bound to leave the same evening after the trial, as, under the cases, he was entitled to rest and refresh himself. Nor was it any deviation that the defendant, instead of lodging at an hotel or inn, went out of town to stay at a friend's house; in all this he was acting within the limits of his privilege, and should not have been arrested at the station on the following morning.

## Robertson v. Glass.

*Embarrassing plea—Immaterial averment—Duplicity.*

The plea set out below was *held* embarrassing, and was ordered to be struck out.

A plea is embarrassing which alleges several facts wholly irrelevant to the question in controversy.

[Chambers, November 26th, 1869.]

The plaintiff as indorsee sued defendant as acceptor of a bill of exchange drawn by one E. E. Gilbert upon and addressed to the defendant.

To this the defendant pleaded as follows:—

"That a certain corporation or body corporate known as and called the Richardson Gold Mining Company had certain dealings with the said E. E. Gilbert, of the city of Montreal, in the declaration mentioned, and from him they purchased certain machinery for the purposes of them the said Richardson Gold Mining Company, and for the purpose of the mining operations then carried on by the said company. Being so indebted to the said Gilbert, he the said Gilbert made and drew the bill of exchange hereafter set out, which was in form and to the effect following, that is to say:

"$800 00. Montreal, February 19th, 1869.

"Two months after date pay to the order of myself at the Jacques Cartier Bank in Montreal, eight hundred dollars value received and charge the same to account of James Glass.

"(Signed,) E. E. Gilbert,
"*Secretary Richardson Gold*
"*Mining Co., Belleville, Ont.*
"*To James Glass.*"

That the said Gilbert drew the said bill for said consideration received by said company, and intended the said bill of exchange, when so drawn, to be accepted and paid by the said company, and he did not when he drew the said bill, intend or understand that the same should be a draft or bill upon the defendant in his individual capacity, or that the same should be accepted by, or be payable by the said defendant in his individual capacity.

That the said bill so drawn and addressed was presented by the said Gilbert to the defendant as secretary to the said company and in his, the defendant's official capacity, that he the defendant then being the secretary of the said company, wrote upon and across the face of the said bill of exchange these words, "Accepted—the Richardson Gold Mining Company, per James Glass, secretary," and that in no other way or form was the said bill of exchange accepted. That the said Gilbert received the said bill of exchange with the said words so written on the face thereof from the defendant in his the said defendant's official capacity as such secretary, and took and kept the same until after the same fell due, and that after the same was long past due, he transferred the same to the plaintiff, who took the same after it was due as aforesaid. That the defendant never had any consideration for accepting the said bill, nor was it ever intended by said Gilbert or defendant, that any personal liability should arise thereon against the defendant. And that the bill of exchange in this plea set out is the bill of exchange in the declaration mentioned, and no other, and the acceptance thereof alleged above, and in this plea mentioned, is the acceptance of the said bill in the declaration mentioned, and that in no other way or form howsoever was the said bill of exchange in the declaration mentioned accepted."

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* Mr. Boyd applied for an order to tax a counsel fee and briefs to the same amount, and in the same manner as would be allowed if the appeal had been argued before the court. The order was granted, but with an expression on the part of the learned judge, that he very much doubted his power to make it, although he stated, that in his opinion it should be granted in cases of this description where the labour of counsel in preparing and arguing the case, and of the attorneys in preparing the briefs, had been very onerous, and precisely the same as if the appeal had been to the court.—Rep.

*Scott*, for defendant, obtained a summons to strike out the above plea as embarrassing and for duplicity: He cited *Bank of Montreal* v. *Delatre*, 5 U. C. Q. B. 362; *Owen* v. *Van Lester*, 10 C. B. 319; Bullen & Leake's Prac. 810.

*Bell*, Q.C. (Belleville), shewed cause, citing *The Great Western Railway Co.* v. *The Grand Trunk Railway Co.*, 24 U. C. Q. B. 107.

Gwynne, J.—The summons in this case, as it appears to me, must be made absolute for striking out the plea which has been pleaded.

The plea sets out the bill sued upon, *verbatim*-by which it appears to have been addressed to the defendant as follows:—"James Glass, secretary Richardson Gold Mining Company, 'Belleville.' The plea also avers, that the bill was presented to the defendant as secretary of the said company, and that he then being 'secretary of the said company' wrote upon and across the face of the said bill of exchange these words, '*Accepted—the Richardson Gold Mining Company, per James Glass, secretary*, and that in no other way or form was the said bill of exchange accepted.' Now if this had been the whole of the plea, the object of the pleader as stated in the argument, namely, of inviting a demurrer for the purpose of submitting to the court as a question of law, whether this constituted the acceptance of the defendant or not would have been effectually obtained: *Yates* v. *Nash*, 8 C. B. N. S. 581. But the plea does more; it avers that the Richardson Gold Mining Company is a body corporate; that it purchased from the drawer certain machinery for the purposes of the company's operations, and thereby became indebted to the drawer and that to obtain payment of the debt so due from the company to the drawer, the latter drew the bill, which is set out *verbatim:* that the drawer, when drawing the bill *intended* that it should be accepted and paid by the company, and did not intend that the same should be a draft or bill upon the defendant in his individual capacity, or that it should be accepted or be payable by the defendant in his individual capacity: that the bill was *addressed* and presented to the defendant *as* secretary of the company and in his official capacity: that the drawer received the said bill, with the said words written on the face thereof, from the defendant in his official capacity, and took and kept the same until after the same fell due, and after it became due he transferred it to the plaintiff, who took the same after it became due: that the defendant never had any consideration for accepting the said bill, *nor was it ever intended* by the drawer or the defendant that *any* personal liability should arise thereon against the defendant."

Now, unless there be some statute authorising the bill of exchange, so drawn and addressed, to be accepted in the manner this was, so as to bind the company, upon whom the bill was not drawn, as the acceptors thereof, it is plain that this is not the acceptance of the company, and unless it be the acceptance of the defendant it is no acceptance at all; if it be no acceptance at all, the plaintiff cannot recover, and this is the only event which can defeat his right of recovery, for, whatever may have been the want of consideration as between the drawer and the defendant, and whatever may have been their intention, not appearing on the face of the bill, as to the exemption of the defendant from a liability appearing on the bill, in virtue of its being accepted if accepted by him, cannot prejudice the plaintiff's right of recovery, although it was transferred to him after it became due, if he gave value, which is not questioned.

These matters alleged in the plea can have no bearing or effect upon the question, whether the bill has been accepted by the defendant or not, and whether he is liable thereon as acceptor or not. Facts alleged in a plea must be taken to be inserted for some purpose. The natural purpose appears to be to invite an issue upon the facts so alleged—and if several of the facts so alleged are wholly immaterial to the merits of the plaintiff's right to recover, he may well, I think, complain that the plea is embarrassing. If he should join issue on the plea, what does it put in issue? Would the acceptance of the bill by the defendant be properly in issue? It may be questionable whether it would—for the allegation "that the defendant never had any consideration for accepting the said bill, and that it was transferred to the plaintiff after it became due," seems to imply an admission of an acceptance, although such acceptance was without consideration; moreover, how could the bill have been transferred after it became due, if having never been accepted it never did become due; whether the plea or any part of it, taken by itself, is good upon demurrer or not, I express no opinion; it is sufficient for the purpose of the present motion to say, that the only material point being whether the bill upon its face shews that it is or is not, as alleged in the declaration, the acceptance of the defendant, all the other matters alleged, although they may be immaterial to that question, may well be complained of as calculated to embarrass the plaintiff, and should not therefore be permitted to be introduced into the record. The case of *The Great Western Railway Company* v. *The Grand Trunk Railway Co.*, 24 U. C. R. 107, to which I was referred, does not in my judgment warrant such a plea as this, nor have I found any case which does.

## MONTGOMERY V. GALE.

*Change of Venue—Set off.*

Where a defendant requires to call five witnesses residing in the county of Grey (the venue being laid in York, and the allegod difference of expense being $80), to prove his set-off, such preponderance of convenience to the defendant is not sufficient, in itself, to justify a change of venue, and thereby deprive the plaintiff of his right to try the action where he has laid his venue.

[Chambers, Nov. 30, 1869.]

The declaration was on the common counts. The defendant pleaded never indebted, payment, statute of limitations and set-off.

The venue being laid in the County of York, the defendant applied to change it to the County of Grey, on affidavits which stated,—that the plaintiff's cause of action, if any herein, arose in the County of Grey, and not in the County of York or elsewhere out of the County of Grey: that this action is brought to recover the sum of three hundred and twenty dollars alleged to have been received by me from the said plaintiff for his use: that I have no recollection of ever having received the said amount from the said plaintiff, or of ever giving any acknowledgment for same, and I verily believe I never received said amount from said plaintiff, although I received a portion of said amount from him: that I have a set-off against the said plaintiff for work and labour, and money paid by me for said plaintiff, and it will be necessary and expedient for me, as I am advised and believe, to subpœna no less than five witnesses to support and establish my defence to this action: that they are as I am advised and believe material and necessary witnesses for that purpose, and it is my intention to subpœna them: that the said witnesses reside in the township of Keppel and the Town of Owen Sound, in the County of Grey or elsewhere in the neighbourhood, and none of them reside in the said County of York: I have no other witnesses that I am aware of to subpœna in support of my defence besides these witnesses: that the expenses of subpœnaing and procuring the attendance of the said witnesses at the trial of this action, if it takes place in the said County of York, will, I verily believe, be at least eighty dollars more than if the trial took place in the County of Grey: that the application to change the venue herein was not made with any object to delay the plaintiff in the trial of this action, but solely to save the additional expense that would be incurred in the trial of it if it should take place in the said County of York.

The plaintiff in reply filed an affidavit stating that he did not believe the expense of trying the case in Toronto wou'd be greater than it would be if tried in Owen Sound: That until lately, he always supposed that the defendant was perfectly good for the amount of his claim herein, but that he was a short time ago informed, that the defendant was becoming worthless, and he verily believed, that unless he got a judgment against the defendant he would lose the whole amount, from what he heard, he was certain that if the venue should be changed to the County of Grey and the trial consequently put off until next assizes, he would not be able to recover any portion of his debt herein.

*John Paterson* shewed cause.

*Osler*, contra.

Gwynne, J.—*Thornhill* v. *Oastler*, 7 Scott, 272, decides that it is the undoubted privilege and right of the plaintiff in a transitory action to lay his venue where he pleases, and that he should not be deprived of that right unless the court is clearly satisfied that justice requires that he should be In *Ladbury* v. *Richards*, 7 J. B. Moore, 82, affirmed in *Clulee* v. *Bradley*, 13 C. B., 609, it was held that to entitle a defendant to change the venue, the proposed defence intended to be set up to the action ought to be fully disclosed. In *Smith* v. *O'Brien* and *Julland* v. *Riches*, 26 L. J. Ex. 30, the application to change the venue was founded upon affidavits somewhat similar to that used in this case; the difference being, that there it was sworn that the defendant had a defence to the action upon the merits, *and also* a set-off exceeding the plaintiff's claim, and the affidavits not having been answered at all, it was held that a *primâ facie* case was made out to shew that it would be more convenient to try the case in the county to which the venue was asked to be changed. This case does not seem to be adopted, at least by all the judges, to any greater extent than to establish that such an affidavit wholly unanswered *may be sufficient* to justify a judge in ordering the venue to be changed, for in *Gough* v. *Bertram*, 27 L. J. Ex. 58, to an observation of Bramwell, B. (upon an affidavit of merits, and that defendant had several witnesses residing in the county to which he desired to change the venue, and that the expense there would be much less than in London, where it was laid), that such an affidavit if unanswered was sufficient to change the venue—Martin, B , answered, that *it was sufficient*, but, he adds " for my own part I do not ever change the venue to the assizes (from the London sittings), except for some real reason sufficient to counterbalance the injury to the plaintiff of delaying his case until the assizes." There £60 of £67 having been paid by the defendant into court, an order to change the venue was drawn up on consent of the parties. In *Ross* v. *Napier*, 30 L. J. N. S. Ex. 2, the rule is stated—that the venue ought never to be changed where it would cause great delay, except upon strong grounds. Now in the present case the plaintiff's claim is for an ordinary money demand, the cause of action for which cannot be said to have arisen in one county more than another. The defendant himself swears, that the action is brought to recover $320, alleged to have been received by the defendant from the plaintiff to plaintiff's use. He says he has no recollection of having received the whole amount, or of having ever given any acknowledgment for same, but he admits having received a portion of the amount, not saying how much, but he says he has a set-off, not saying for how much, whether sufficient to cover the whole of the plaintiff's demand, or only a part, and if a part what part thereof. The plaintiff answers this affidavit by saying that his cause of action is evidenced by defendant's receipts or acknowledgments in writing, and that he is apprehensive that the circumstances of the defendant are not good, and that if delayed in this action until the Spring assizes at Owen Sound, he will by reason thereof lose the amount of his claim, and every part thereof. Now from these affidavits it is clear, that in so far as the plaintiff's cause of action is concerned, there is no reason whatever given for changing the venue. This being so, the question I have to decide in this case is, whether inasmuch as the defendant requires to call five witnessess, residing in the county of Grey, to support the cause of action involved in his set-off, the convenience to the defendant of having the action tried there so preponderates as to justify me in depriving the plaintiff of his undoubted right, of trying his action in the county where he has laid his venue, and as to which, standing alone without the set-off, there is no reason given for changing the venue.

It has been urged that the defendant is *entitled* to have it changed, as the plaintiff has not filed an affidavit shewing what witnesses he has to call or where they reside. But it is to be observed, that as to the plaintiff's cause of action, the defendant's affidavit does not show that *he* has any witnesses, and it does not appear that the plaintiff has been made aware of the particulars of the defendant's set-off to enable him to say whether he would admit the whole or any part of it, or whether he will be required to call any witnesses in respect of it. In *Jackson* v. *Kidd*, 8 C. B. N. S., 355, Erle, C. J., says—"the principle upon which the judges have been guided since the passing of the C. L. P. A. 1852, is this, that if it be made to appear that there will be great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place to which it is sought to change the venue, the judge is at full liberty to exercise his discretion in the matter, and to make the order if he sees fit." I agree with Martin, B., that the delay occasioned to the plaintiff is an element to be considered, and inasmuch as the plaintiff swears that he apprehends the delay might cause him the loss of his debt, I do not think it would be a sound exercise of discretion in me to expose him to such a danger, because the defendant pleads a set-off to prove which he requires five witnesses residing in the county of Grey. Whether plaintiff's apprehensions are well or ill founded, he swears to them, and I do not think I should try upon affidavits the reasonableness of these apprehensions; he may have laid his venue for the winter assizes at Toronto, expressly because of these apprehensions, and I think the delay of four months, which would be occasioned to the plaintiff if the proposed change should be granted, may be so material to the plaintiff that I should not deprive him of an undoubted right because it may be more convenient to the defendant to have the question of his set-off tried where he and his witnesses reside. I think, moreover, that where the defendant rests his ground of convenience upon a cause of action of his own involved in a set-off, he ought before he applies, at least to place the plaintiff in possession of full particulars of that set-off to enable him either to admit it in whole or in part, or to say whether he may not have witnesses to call in respect of it; and that if he does not do so he cannot fairly seek an advantage from the circumstance of the plaintiff not answering so much of the defendant's affidavit as relates to the expense to him of establishing his set-off. Cases of this nature must all be decided according to their particular circumstances, and the view which the judge before whom the motion is made may take of the sufficiency of the circumstances in each case, as justifying him or not in depriving a plaintiff of an undoubted right.

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### John J. Robson v. Warren & Washington.

*Insolvency—Misdescription of creditor in schedule.*

The name John Robinson appeared in the schedule of defendant Warren, an insolvent, and notices were mailed to him under that name. The insolvent swore that this entry in the schedule was intended for the plaintiff, and that he was known by both names.

But *held* that the plaintiff could not be considered to be sufficiently described as a creditor under the name of John Robinson.

[Chambers, January 5, 1870.]

This was a summons calling upon the plaintiff to shew cause why the writ of execution issued herein on 17th November, 1869, and the seizure made thereunder of the goods and chattels of the above defendant John Warren, should not be set aside, as respects the defendant Warren, on the ground that subsequent to the recovery of the judgment herein the said defendant Warren had obtained his discharge under the Insolvent Acts of 1864 and 1865.

It appeared from the affidavits filed on obtaining this summons and in answer thereto, that in October, 1864, the plaintiff obtained a judgment in this case for the sum of $552.25 damages and costs, and that execution against the goods and chattels of the defendants was issued thereon and returned *nulla bona*. The defendant Warren swore, "I believe that the above-named plaintiff recovered a judgment against me and my co-defendant the said John Washington in the year 1864, upon a promissory note for four hundred dollars or thereabouts, made by me and the said John Washington. That owing to sundry losses I was unable to pay my debts and liabilities, and on or about the 21st March, 1865, I duly caused notice under the Insolvent Act of 1864, to be duly published in the *Canada Gazette* and local paper, calling a meeting of my creditors, to be held at the office of S. B. Fairbanks, in the village of Oshawa, on the 10th day of April, 1865, a copy of which notice I duly forwarded to the plaintiff by placing the same in the post office at Oshawa addressed John Robinson, Bond Head." It appeared further from his affidavit, that on the 17th day of April, 1865, he made an assignment in duplicate under the said act to Mr. Macnachton, official assignee of the united counties of Northumberland and Durham, within which both plaintiff and defendant resided.

In the schedule of creditors of the said Warren the following entry appeared:

"John Robinson, Bond Head, judgment on suit $448," which defendant Warren swore was intended to represent this debt.

It appeared that the plaintiff resides at Newcastle, but that adjoining to or within the limits of that village is a small place known as Bond Head; but the only post office is at Newcastle.

*Osler* showed cause, citing *King* v. *Smith*, 19 U. C. C. P. 319; *Proudfoot* v *Lount*, 9 Grant, 70; *McDonald* v. *Rodgers*, *Ib.* 75.

*W. Sydney Smith* supported the summons

Galt, J.—The plaintiff swore most distinctly that he never received any notice of any proceedings being taken by Warren under the Insolvent Act, or had any knowledge of his having obtained his discharge until after the same had been granted. It is not disputed that all notices sent by the official assignee to the plaintiff were addressed "John Robinson, Bond Head"; but it is asserted on the part of Warren, that the plaintiff was known to himself and others by the name of Robinson, and that he was in the habit of receiving from the post office at Newcastle letters addressed John Robinson. The plaintiff, on the other hand, swore most positively that he never received any notice so addressed in relation to this matter, and it is quite evident from Mr. Macnachtan's affidavit that any notices sent by him were not intended for the plaintiff, for he states that he has known him intimately for about fifteen years; "that his name is John James Robson, by which name he is well and generally known, and by which I have always known him, and he is not known by the name of John Robinson; that the post office address of the said plaintiff is now and has been since I knew him at the village of Newcastle in the county of Durham; that as the name of the plaintiff is not upon the schedule of creditors furnished me by the defendant John Warren, I could not have forwarded to the said plaintiff by his proper name and style and to his proper post office address, any notice of any kind relating to the insolvency of the said defendant John Warren, of his having assigned to me or calling meetings of his creditors or any notice whatever; that I do not believe that a letter or notice addressed John Robinson, Bond Head, and posted in this town or elsewhere would reach the said plaintiff at Newcastle."

By the 2nd section of the Insolvency Act of 1864, the person intending to avail himself of the provisions relating to voluntary assignments (which this was) must exhibit a schedule containing the names and residences of all his creditors; it is his positive duty to do this with accuracy, as he is required to swear to its truth. The defendant Warren did not do this. In fact, considering that John Robinson appears in the schedule as the second largest creditor, it would really appear that he had given himself very little trouble about it. The debt also is materially misdescribed being $448 in place of $552.25. There is a good deal of contradiction in the evidence, but in my opinion the evidence on the part of the plaintiff, as regards his never having received any notice of the insolvency proceedings is very much stronger than that on the part of the defendant, and from the affidavit of the official assignee it is manifest that he was not aware that the plaintiff was a creditor of the insolvent and that he never intended to give him any notice. A discharge under the Insolvent Acts of 1864, 1865, operates only as a discharge from the liabilities mentioned and set forth in the statement of the affairs of the insolvent annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge. No such supplementary list appears to have been furnished in this case. The name of the plaintiff does not appear in the list of creditors and consequently his claim is not discharged. It seems to me impossible to hold that a creditor described as John Robinson, Bond Head, should be considered as properly described when his true name is John James Robson and his address Newcastle.

*Summons discharged with costs.*

## ENGLISH REPORTS.

### CROWN CASES RESERVED.

### Reg. v. Ritson and Ritson.

*Forgery—Ante-dating a deed—24 & 25 Vict. c. 98, s. 20.*

A deed really executed by the parties between whom it purports to be made, but ante-dated with intent fraudulently to defeat a prior deed, is a forged deed.

[C. C. R., 18 W. R. 73.]

Case stated by Hayes, J:—

The prisoners were indicted at the last Manchester Assizes under 24 & 25 Vict. c. 98, s. 20, for forging a deed with intent to defraud James Gardner. William Ritson was the father of Samuel Ritson, and prior to May, 1868, had been the owner in fee of certain building land, on the security of which he had borrowed of James Gardner more than £730 for which he had given him on the 16th of January, 1868, an equitable mortgage by written agreement and deposit of title deeds.

On the 5th May, 1868, William Ritson conveyed all his estate real and personal to a trustee for the benefit of his creditors, and on the 7th of May, 1868, there being then due to James Gardner from William Ritson a sum in excess of the value of the land, William Ritson and the trustee conveyed the land, in fee, to James Gardner, covenanting that they had good right to convey, except as appeared by the deed. The deed contained no mention of the deed which the prisoners were charged with forging.

James Gardner entered into possession of the land so conveyed to him, and about March, 1869, he employed William Ritson to erect some buildings on adjoining land, and permitted him to erect a shed on the land conveyed to him as aforesaid. He afterwards wished to have the shed removed, and upon Ritson's refusing to do so, removed it himself; Samuel Ritson thereupon brought an action of trespass against him, claiming under the deed charged as a forged deed.

This deed was dated the 12th of March, 1868, and purported to be a demise from William Ritson to Samuel Ritson for 999 years from the 25th March, then instant, of a large part of the frontage and most valuable part of the land which had been conveyed to James Gardner. It was executed by both the Ritsons, and professed to have been attested by a witness; but such witness was not called at the trial, nor was any evidence given as to the professional man by whom the deed was prepared. Although the deed was dated 12th March, 1868, it was proved by the stamp distributor who had issued this stamp, that it was not issued before the 7th of January, 1869, nor was the deed ever mentioned by the prisoners before that year.

It was contended on the part of the prosecutor that the deed was a forged deed, made after the prosecutor's conveyance, and ante-dated for the fraudulent purpose of over-reaching that conveyance, and so endeavouring to deprive the prosecutor of his estate under the said conveyance, and of a considerable part of the property for a long term, and leaving only a valueless reversion in him in such part of the property.

The counsel for the prisoners contended that the deed could not be a forgery, as it was really executed by the parties between whom it purported to be made, and that there was no modern authority in support of the doctrine contended for by the prosecution He also contended that the prosecutor had obtained his conveyance by fraud, and that it was void against the prisoners, and if so, the lease would be rightfully made.

The jury found that there was no ground for imputing any fraud to the prosecutor with regard to his security and conveyance; and the learned judge having expressed an opinion in conformity with the authorities cited, on the part of the prosecution, informed the jury that if the alleged lease was executed after the prosecutor's conveyance, and ante-dated, with the purpose of defrauding him, it would be a forgery. The jury found both the prisoners guilty, and in pursuance of the request of the prisoners' counsel, the question whether the prisoners were properly convicted of forgery under the circumstances was reserved for the opinion of the Court for the consideration of Crown Cases reserved.

*Torr* for the prisoners.—There is no authority for holding this to be forgery, except the case of *Salway* v. *Wale*, Moore, 655, cited by Coke, 3rd Inst p. 169. Coke there says:—The statute of 1 Hen. 5 hath these words [forge of new any false deed] and yet if A. make a feoffment by deed to B. of certain lands, and after A. maketh a feoffment by deed to C. of the same land, with an ante-date before the feoffment to B, this was adjudged to be a forgery within that statute, and by like reason, within this statute also" (5 Eliz. c. 14); "and the rather in respect of the words subsequent [or make, &c.]." But there are no such words in 24 & 25 Vict. c. 98, s. 20, upon which this indictment is framed. The section only applies, to "forging or altering," and what was done here did not amount to forgery, and came within no definition of that offence. [Martin, B.—It is defined in 2 East, P. C. 852, as "a false making of any written instrument for the purpose of fraud and deceit]. There is a distinction between a mere false statement and an instrument false in itself, and this was a mere falsehood. Suppose a man who had no property were to make a purely imaginary conveyance, that would clearly be no forgery: how does the case differ because he once had property with which he has parted, and then purports to convey it again? [Blackburn, J.—Is there any case which conflicts with the passage in 3 Inst. and the case in Moore?] No: but that case is not referred to in Comyn's Digest, tit. Forgery, and he defines forgery to be the fraudulent writing or publication of a "false deed." [Blackburn, J.—A deed is false if it purports to be, what it is not; is not that the case where it purports to be of a day on which it was not in fact made—the date being material, and being inserted for the purpose of fraud?] I should submit that the deed is not false, but contains a falsehood, and might be ground for an indictment for conspiracy, or for obtaining money by a false pretence, but not for forgery.

*Addison*, for the prosecution.—According to all the authorities, this was a forgery, for it was the making of a false deed with intent to defraud. In addition to the definitions already quoted, it is said, in Bacon's Ab: Forgery, p. 745: "The notion of forgery doth not consist so much in the counterfeiting of a man's hand and seal, which may often be done innocently; but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is in no way privy to; *or at least to make a man's own act appear to have been done at a time when it was not done*, and by force of such a falsity to give it an appearance which in truth and justice it ought not to have. Hence, it is holden to be forgery for a man to make a feoffment of certain lands to J. S; and afterwards make a deed of feoffment of the same lands to J. D. of a date prior to that of the feoffment to J. S., for herein he falsifies the date in order to defraud his own feoffee, by making a second conveyance which at the time he had no power to make: 3 Inst. 169, Pult. 46 b. 27 H. 6; 3 Hawk. P. C. c. 70, s. 2."

Kelly, C.B—I have entertained some doubt upon this question, because all the authorities upon the subject are comparatively ancient, and long anterior to the statute 24 & 25 Vict. c. 98, or to 11 Geo. 4, c. 66, which was in operation before that statute was passed. But, on referring to all the ancient authors, and to all writers upon criminal law, Coke, Foster, Comyns, and others, we find that they are uniform to the effect, not that every instrument which contains a false statement is forged, but that every instrument which purports to be what it is not, as by purporting to be executed on a day on which it is not in fact executed, is a forgery if the date is material and is inserted with intent to defraud.

I think that it is impossible to distinguish this case from the old authorities and text writers, and that it comes within the definition of forgery given by them.

Martin, B.—I am of the same opinion. I agree with Mr. Torr that this is not an ordinary instance of forgery; but all the books, ancient and modern, concur in their definition of that offence, and this case is clearly within those definitions. In Tomlin's Law Dictionary, Forgery, 7, I find it said that "when a person knowingly falsifies the date of a second conveyance, which he had no power to make, in order to deceive a purchaser, &c., he is said to be guilty of forgery: 3 Inst. 169; 1 Hawk. P. C. c. 70."

Blackburn, J.—I am of the same opinion. The statute 24 & 25 Vict. c. 98, s. 20, makes it a felony to "forge" a deed with intent to defraud; it does not define forgery, and the question is what is included in that word. The correct definition, as I understand it, is that given by Baron Comyns: "Forgery is where a man fraudulently writes or publishes a false deed to the prejudice of the rights of another." Not "a deed containing a falsehood," but "a false deed." Then, according to the passage cited from Bacon's Ab. by Mr. Addison: "The notion of forgery may consist in making a man's own act appear to have been done at a time when it was not done;" and if an instrument purports to have been made at a time when it would have one effect, and has in reality been made at a time when it would have another effect, that I think would make the deed a false deed, and be forgery. The date of a deed is frequently quite immaterial, but here that is not so. The date is shown by extrinsic evidence to be false, and the deed is therefore a false deed within all the definitions. Even without any authority upon the question, I think that common sense would lead to this conclusion. But all the authorities are at one upon this point. Lord Coke refers to the Year Books to show that forgery includes this very case; the case in Moore as far back as the time of Queen Elizabeth, is to the same effect. In the case of Ann Lewis, Foster's Crown Cases, 116, the same view was taken by eleven judges in consultation. No authority can be cited on the other side, and the only argument against this view is that there is no recent authority in support of it.

**Lush, J.**—I am of the same opinion. If the parties had originally made a deed bearing a true date, and had then fraudulently altered the date, no question could have been raised; it seems to me that it would be an absurdity that the alteration of a true date to a false should be a forgery, and yet that the making of a deed with a date originally false should not be. I think that this deed was "a false deed" within all the definitions, as purporting to be what it in fact was not.

**Brett, J.**, concurred.

*Conviction affirmed.*

## COMMON PLEAS.

### Farrow v. Wilson.

*Master and servant—Determination of contract of service by the death of the master.*

A. engaged B. to serve him as farm bailiff at certain wages, the service to be determined by six months' notice by either party, or on payment by A. to B. of six months' wages. On A.'s death the defendants, A.'s administrators, dismissed B. without notice or payment of the six months' wages.

*Held*, on demurrer, that the contract of service was determined by the death of the master, and that the general rule, that the death of either party puts an end to contracts of personal service, unless the contrary be stipulated for, applied to the present case.

[C. P. 18 W. R. 43.]

This was an action brought against the defendants as administrators of Pugh, deceased.

The declaration stated that heretofore in the lifetime of Pugh, in consideration that plaintiff would enter into the service of Pugh, and serve him as farm bailiff, at the wages of 15s. per week, and of a certain residence in a farmhouse, until the service should be determined. Pugh promised the plaintiff to retain him in his service until the expiration of six months after notice given by Pugh or the plaintiff to the other of them to put an end to such service, or that in case Pugh should put an end to such service without such notice he should pay to the plaintiff such wages at the same rate for the said six months from the time of the end of such notice; and the plaintiff accordingly entered into the said service of Pugh, and continued therein until the death of Pugh, and has always been ready and willing to continue in the service of his administrators in the capacity and on the terms aforesaid, of which the defendants always had notice, yet the defendants wrongfully dismissed the plaintiff from the said service without such notice as aforesaid, and without paying the plaintiff such six months' wages as aforesaid, whereby the plaintiff was deprived of the wages, &c., which he would have derived from the said service, and has remained for a long time unemployed.

Demurrer and joinder in demurrer.

*Bridge*, in support of the demurrer.—The declaration is bad. There has been no breach of the contract alleged in the declaration. A contract of personal service expires on the death of either party. In Williams on Executors, 6th ed. p. 765, the correct rule is laid down: "By the death of a master his servant is discharged; and therefore the executors or administrators of the former can bring no action to enforce the contract of service after his death." (Wentw. Off. Ex. 141, 14th edit). If it had been intended that the executors should be bound by the contract they would have been named in it. In *Tasker* v. *Shepherd*, 9 W. R. 476, 6 H. & N. 575, it was held that where a person had been appointed as the agent of a partnership given for the period of a certain number of years for the sale on commission of certain stone, that the contract was subject to the condition that all the parties should so long live, and that it did not contemplate the continuance of the agency by the executor after the death of the agent, or by the surviving partner after the death of the other member. In *Boast* v *Firth*, 17 W. R. 29, L. R. 4 C. P. 1, a covenant in an apprenticeship deed that the apprentice will honestly remain with and serve his master for a certain term, is subject to an implied condition that the apprentice shall continue in a state of ability to perform his contract. To an action therefore by the master for breach of the covenant. A plea that the apprentice was prevented by the act of God—to wit, permanent illness—which arose after the making of the deed and before breach, was held good. Montague Smith, J., says in his judgment in that case:—*Taylor* v. *Caldwell*, 11 W. R. 726, seems to be decided on the principle that where parties are contracting about a certain thing or person there is an implied condition that the thing or person shall continue to exist in a state fit for the performance of the contract, and that if that state ceases to exist, then the obligation ceases. This contract could not have been intended to continue after the master's death, for one term of the contract is that the plaintiff shall occupy the farmhouse.

*Bush Cooper*, *contra*.—The services of farm bailiff would not be determined by the death of the master. The nature of the contract must be looked at for the purpose of placing the right construction upon it. He cited *The King* v. *The Inhabitants of Ladock*, Burr. Sett. Cas. 179; *The King* v. *Peck*, 1 Selk. 66.

July 5.—The judgment of the Court (**Willes, J.**, and **Montague Smith, J.**), was delivered by

**Willes**, J.—This is an action by a servant against the administrators of a deceased master, and the question is whether the contract of service was determined by the death of the master. It was not on account of any doubt we had at the time that we deferred giving judgment. We are of opinion that our judgment ought to be for the defendants. The declaration alleges a contract between the plaintiff and defendants' testator to serve in the capacity of farm bailiff, and it is not stated in the declaration that either party, either expressly or impliedly, contracted for his executors or administrators. The general rule of law is, that the death of either party puts an end to such contract of personal service, unless there is a stipulation, expressed or implied, to the contrary. There being no such stipulation in the present case, the servant as well as the personal representatives of the testator are equally discharged from such a contract by the death of the master.

*Judgment for the defendants.*

## CHANCERY.

### Robinson v. Wood.

*Warrant of attorney—Judgment—Rate of interest.*

A memorandum indorsed on a warrant of attorney stated that the warrant had been given to secure the payment on the 2nd of June, 1864, of a sum of money, with interest thereon at the rate of £5 per cent. per month; that judgment was forthwith to be entered up, and that if the debt and interest were not paid on the day aforesaid, execution was to issue. The debt was not paid at the time named, and judgment was not entered up.

*Held*, that after the day named for payment the debt carried interest at £4 per cent. per annum only.

[V. C. S. 18 W. R. 32.]

This suit was instituted to administer the estate of William Bevan, deceased, and the present application was to take the opinion of the judge upon the chief clerk's certificate, allowing to a claimant, Mr. Robert Cook, interest at the rate of £60 per cent. upon a debt secured by a warrant of attorney, on which was endorsed a memorandum in the words following, viz.:—

"Memorandum.—The within written warrant of attorney is given for securing the payment of the sum of £1,330, with interest thereon at and after the rate of £5 per cent. per month on the 2nd day of June next. Judgment to be entered up forthwith, and in case of default in payment of the said sum of £1,330 and interest thereon on the day aforesaid, execution or executions and other process may then issue for the said sum of £1,330 and interest, together with costs of entering up judgment, registering same, and writ and writs of execution or executions, sheriffs' poundage, officers' fees, and all other incidental expenses whatsoever. Dated 2nd day of May, 1864."

The debt was not paid on the day named for the payment thereof, and no judgment upon the warrant of attorney had ever been entered up. The chief clerk by his certificate dated the 12th of February, 1869, had allowed interest up to that day at the rate of £5 per cent. per month, or £60 per cent. per annum, and the summons was to take the opinion of the judge as to whether this rate of interest should not be reduced to £4 per cent. per annum, or to such other rate as the court might think fit.

*Green*, Q.C., and *F. J. Wood*, for the executors.

*Dickinson*, Q.C., and *Daly*, for Mr. Cook, the claimant, referred to *Sherborn* v. *Lord Huntingtower*, 11 W. R. 344, 13 C. B. Rep. N.S. 742.

*Bristowe*, Q.C., and *Bagshawe*, for the plaintiff.

*Fischer*, for other parties.

**Stuart**, V. C., thought that after the second of June, 1864, Mr. Cook was entitled to interest at the rate of £4 per cent. per annum only, and ordered the certificate to be varied accordingly.

### In re Lever's Trusts.

*Will—Construction.*

A testatrix gave a sum of money in trust for "my nephew and nieces." She had numerous nephews and nieces, but in a former part of the will she had mentioned by name four nieces and one nephew.

*Held*, that all the nephews and nieces were entitled to a share of the trust money.

[V. C. M. 18 W. R. 35.]

A testatrix by her will gave her household furniture, plate, linen, books, &c., to four of her nephews and one of her nieces by name. In a subsequent part of her will she gave the sum of £600 to trustees in trust to invest and pay the dividends to "my nephew and nieces." She had at the time of her death seventeen nephews and nineteen nieces. A petition was now presented by the nephew and nieces named in the will to know whether they alone were entitled to the dividends of the £600.

*B. B. Rogers*, for the petition, contended that the word "said" had been accidentally omitted before the word "nephew."

*Renshaw*, for the testatrix's other nephews and nieces, contended it was much more probable that the letter "*s*" had been omitted at the end of the word "nephews." The testatrix knew she had other nephews and nieces besides those she had named.

*Wigglesworth*, for the residuary legatees, contended that it was impossible to say which nephew was intended by the testatrix, and that his share accordingly fell into the residue.

*Rogers*, in reply.

*Soley*, for the trustees.

**Malins**, V. C., said that although the testatrix might not have meant it, yet that on the whole he was bound to conclude that all the nephews and nieces were entitled to share in the dividends of the £600.

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**The Manx Laws.**—The grossly defective state of the Manx criminal code has just led to a miscarriage of justice. The woman who was accused of having tried to murder her husband, by slowly poisoning him, at Port Crin, was put on trial on Thursday; but, although the evidence was almost overwhelming, the prosecution had to be withdrawn, as there is no provision under the Manx criminal code for the punishment of a person charged with attempting to murder by poison.—*Daily Paper.*

# DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

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*(Concluded from Vol. V. page 300.)*

Account.

A., the owner of a patent for a loom, agreed with B. that B. should make and sell such looms; A. to receive as a royalty, not to exceed £20, the amount for which the looms were sold above £45. B.'s charges were not to exceed £45, and one-tenth of the royalty. *Held*, that A. could not bring a bill in equity for an account against B., as there was no agency in which a fiduciary position was created.

A single receipt by B. of money due to A. did not alter the case.—*Moxon* v. *Bright*, L. R. 4 Ch. 292.

*See* Election; Rebellion.

Acquiescence—*See* Bank.

Action—*See* Award, 2; Conflict of Laws.

Administration—*See* Executor and Administrator.

Admiralty—*See* Collision; Salvage.

Adultery—*See* Alimony, 2.

Affidavit—*See* Evidence, 8; Interpleader.

Agent—*See* Account; Cheque; Collision, 2; Company, 4; Libel, 1; Mortgage, 4; Rebellion.

Agreement—*See* Contract.

Alimony.

1. A respondent is not entitled to alimony while she is living with the co-respondent as his wife, and supported by him.—*Holt* v. *Holt*, L. R., 1 P. & D. 610.

2. The court refused to make any order for alimony, *pendente lite*, after a decree *nisi* had been obtained for a dissolution of marriage by reason of the wife's adultery, the wife having allowed nearly a year to elapse after the commencement of the suit before she filed her petition for alimony.—*Noblett* v. *Noblett*, L. R., 1 P. & D. 651.

Amendment—*See* Will, 6.

Ancient Light—*See* Light.

Appeal—*See* Collision, 2; Nuisance, 2.

Appointment.

1. A leasehold for lives was settled upon trust for A. for life, with remainder to defendant. A. renewed the lease to himself and his heirs, and purchased the fee which was conveyed in trust for him. Then he made an oral demise for a year, and died between two rent days. *Held* (reversing the decision of Stuart, V.C.), that the rent was not apportionable either under St. 11 Geo. II. c. 19, or 4 & 5 Will. IV. c 22.—*Mills* v. *Trumper*, L. R. 4 Ch. 320; s. c. L. R. 1 Eq. 320; 1 Am. Law Rev. 168.

2. By a will which came into operation after the passing of the Apportionment Act, 4 & 5 Will. IV. c. 22, real estate was devised to A. for life, subject to impeachment for waste, with remainder to B. for life without impeachment for waste, with remainders over. With the sanction of the court, timber on the estate was cut down and sold, and the proceeds of sale invested; and the dividends were ordered to be paid to A. during his life: *Held*, that the whole of a dividend which accrued shortly after the death of A. was payable to B., and could not be apportioned between him and the representatives of A.—*Jodrell* v. *Jodrell*, L. R. 7 Eq. 461.

*See* Marshalling of Assets.

Arbitration—*See* Award; Error.

Articles—*See* Contract.

Assault.

Counts in an indictment for "unlawfully and maliciously wounding," and for "unlawfully and maliciously inflicting grievous bodily harm," will each support a conviction of an assault, though the word "assault" is not used in either.—*The Queen* v. *Taylor*, L. R. 1 C. C. 194.

Assumpsit—*See* Award, 2.

Attorney.

When an attorney has been struck off the roll for a fraudulent misappropriation of moneys of a client intrusted to him for investment, it is a condition precedent to his being restored that he should have used the best efforts in his power to make full restitution.—*Re Poole*, L. R. 4 C. P. 350.

*See* Mortgage, 4; Partnership, 1.

Award.

1. The master made an award in favor of the defendant by mistake, from omitting to take account of an advance by the plaintiff to the defendant, which had been duly proved before the master, but which, at the time of making the award, he overlooked. The mistake was admitted by both parties, and the master stated the facts of the case to the court. *Held*, that the court had power to refer the award back to the master, on motion. —*Flynn* v. *Robertson*, L. R. 4 C. P. 324.

2. J., the outgoing tenant of a farm, and F., the incoming tenant, referred the amount to be paid by F. to J. to two valuers, who

made a valuation. F. paid part and gave his note for the rest, and entered into possession. Later, F. found that errors had been made in the valuation, by including items which, by the custom of the country, ought not to have been valued to him, and items which did not exist. He nevertheless paid his note; but afterwards, without making any demand or informing J. of the nature of his complaint against the valuation, he sued J. for money had and received. *Held*, that F. could not recover.—*Freeman* v. *Jeffries*, L. R. 4 Exch. 189.

*See* Error.

Bailment—*See* Damages; Pledge.

Bank.

A bank account which was largely overdrawn, was, for the half-year ending June, 1867, charged with interest at 5 per cent. and a commission of £500. The pass-book balanced on this footing was sent to the customer, who raised no objection to the charges. He died December, 1867. *Held*, that the charge of £500 for said half-year had been acquiesced in and was valid, but that this could not be inferred for subsequent half year. Also, that the right of the bank to charge compound interest ended with the death of the customer.—*Williamson* v. *Williamson*, L. R. 7 Eq. 542.

Bankruptcy.

1. A delivery of goods, to be an act of bankruptcy within 12 & 13 Vict. c. 106, s. 67, must pass, or purport to pass, an interest in the goods.—*Isitt* v. *Beeston*, L. R. 4 Exch. 159.

2. A. and B. were partners, and B. fraudulently indorsed certain bills belonging to the partnership to C. in payment of a private debt, C. being aware of the fraud. B. having become bankrupt, his assignee disaffirmed the transaction as a fraudulent preference, and joined with A. in an action against C. *Held*, that the assignees were entitled to disaffirm B.'s act, though dealing only with partnership property; and that they could rightly join with A. in the action.—*Heilbut* v. *Nevill*, L. R. 4 C. P. 354.

3. The husband of a devisee in remainder had issue, became bankrupt, and was discharged, before the estate vested in possession. *Held*, that his inchoate right of curtesy did not accrue until after his discharge, and so did not pass to his assignees.—*Gibbins* v. *Eyden*, L. R. 7 Eq. 371.

4. M. borrowed money from the R. Company, giving them his acceptances and depositing shares as security. When the bills became due, the company sent M. fresh drafts for acceptance, with a letter stating them to be in place of those falling due. M. accepted the drafts in compliance with the letter. M. died insolvent, and the R. Company became insolvent also. Both sets of bills had been negotiated and were outstanding. *Held*, that the holders of the first set had no claim to payment out of the deposited shares. The letter and M.'s acts put an end to the security in respect of the first set of bills.—*In re General Rolling Stock Co. Ex parte Alliance Bank*, L. R. 4 Ch. 423.

5. L. deposited with a company securities for the payment of any money which should be owing by L. to them on a general account. Then the company accepted bills for L.'s accommodation. Before said bills, which were L.'s only debts to the company, were paid, both L. and the company became insolvent. *Held*, that neither the bill-holders nor L. were entitled to have the bills paid out of the securities. –*Levi & Co.'s Case*, L. R. 7 Eq. 449.

6. A bank permitted A. to overdraw his account, on having a guaranty to the extent of £300 from a surety, which provided that all dividends, compositions, and payments received on account of A. should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance due to the bank. A., when indebted to the bank for £410, compounded with his creditors, the assets to be administered as in bankruptcy. The surety was secured by a mortgage from A., which was realised, and he paid the bank £300 from the proceeds. *Held*, that the bank was entitled to receive dividends on the whole £410, until the sums so received, added to the £300, should equal the whole amount due.—*Midland Banking Co.* v. *Chambers*, L. R. 4 Ch. 398; s. c. L. R. 7 Eq 179; 3 Am. Law Rev. 683.

*See* Company, 1, 3; Fraudulent Conveyance; Trust, 1; Wife's Equity.

Bigamy—*See* Death, 1.

Bill of Lading—*See* Carrier, 1.

Bills and Notes—*See* Bankruptcy, 4, 5; Cheque; Company, 4.

Bond.

G., an officer twenty-six years old, gave a bond for £1000 to J., a barrister thirty-two years old, without consideration; and at J.'s instance wrote him a letter stating that, for services which were recited, he desired to give J. a promise to pay that sum. G. testified that he thought that he was signing something for J.'s accommodation, and that J. would indemnify him. J. afterwards told G. that G. was under no liability for him; but later he assigned the bond and letter to B., who took *bona fide* and for value. B. refrained from suing on the bond, on the strength of a promise by G. to pay as soon as he should come into certain property, G. not knowing his right to have the bond set aside. *Held*, that G. had a right to have both J. and B. restrained from suing on the bond.—*Graham* v. *Johnson*, L. R. 8 Eq. 36.

*See* Executor and Administrator, 3.

Burden of Proof—*See* Will, 1.

Carrier.

1. A parcel containing pictures was delivered to the defendants, common carriers, who gave a bill of lading by which they were not to be liable for loss by railway accidents, among other exemptions. By the Carriers' Act, s. 1, no common carrier by land is liable for pictures, *inter alia*, contained in any package delivered to be carried, when the value exceeds £10, unless at the time of the delivery, &c., the nature and value be declared and an increased charge paid. By s. 6, nothing in the act is to annul or in anywise affect any special contract between a common carrier and any other parties for the conveyance of goods. The value of said pictures was not declared. *Held*, that the defendants received said pictures as common carriers, in spite of the exemption in the bill of lading, and that, as said exemption was not inconsistent with the further exemption in s. 1 of the Carriers' Act, s. 6 did not apply, and the defendants were not liable. (Exch. Ch.)—*Baxendale* v. *Great Eastern Railway Co.*, L. R. 4 Q. B. 244.

2. A railway company refused to carry, free of charge, a "spring horse" (a substitute for a rocking-horse), weighing 78 lbs, and 44 inches long, tendered to them by a passenger, who was entitled to take with him 112 lbs. weight of "ordinary" or "personal" luggage. *Held*, that the company had a right to make an additional charge.—*Hudston* v. *Midland Railway Co.*, L. R. 4 Q. B. 366.

3. A carrier of passengers for hire does not warrant that the carriage in which a passenger travels is roadworthy. He is bound to use all vigilance to insure safety, but is not liable for a defect which could not be detected, and which arises from no fault of the manufacturer.—(Exch. Ch.) *Readhead* v. *Midland Railway Co.*, L. R. 4 Q. B. 379; s. c. 2 Q. B. 412; 2 Am. Law Rev. 107.

Case Stated—*See* Error.

Charging Order—*See* Fraudulent Conveyance.

Charity.

1. A testator, after giving other legacies, gave £4000 to the Royal Society (incorporated "for improving natural knowledge"), £4000 to the Royal Geographical Society (incorporated for "the improvement and diffusion of geographical knowledge"), and like sums to three other charities. He directed the charitable legacies to be paid out of the pure personalty, and gave the residue to his executors for their own use. He left £6711 pure personalty, £8045 proceeds of leaseholds, and £867 proceeds of real estate in Madeira. *Held*, that the legacies to said societies were to charities within St. 9 Geo. II. c. 36, and that the proceeds of the Madeira estate were not an interest in land within said act. But (varying the order of Stuart, V.C ) the debts, funeral and testamentary expenses, and costs of suit were payable ratably out of the three funds. Then the pure personalty was to be first applied to the charities, other legacies to be paid out of the impure. The charities, so far as unpaid, were also to participate in the prodeeds of the Madeira property, abating in the proportion of the impure personalty to the Madeira property.—*Beaumont* v. *Oliveira*, L. R. 4 Ch. 309; s. c. L. R. 6 Eq. 534; 3 Am. Law Rev. 686, 722.

2. A charity was founded in 1626 for the clothing of eight poor boys of the town of E., and causing them "to be put to some petty school, to the end they may learn to read English, and there to be so kept until they shall attain the age of thirteen years, thereby to keep them from idle and vagrant courses, and also instruct them in some part of God's true religion." *Held*, that the primary object was education, and for very poor boys. *Scheme:* An elementary school for boys of E., with twenty-five free scholarships, and clothing for twenty, for boys selected for merit, &c., or for poverty, at the option of the trustees. A superior school for boys from the whole parish, with three free scholars selected by competitive examinations. Capitation fees to be paid by the boys of both schools.—*In re Latymer's Charity*, L. R. 7 Eq. 353.

3. The House of Lords had directed that a scheme be framed for a charity, leaving the question whether a proposed building should be erected to the discretion of those who would consider the scheme, and in the exercise of such discretion it had been determined not to build. *Held*, that said determination was final and conclusive on the House.—*Clephane* v. *The*

*Lord Provost, &c., of Edinburgh*, L. R. 1. H. L. Sc. 417.

Cheque.

Plaintiff took from her debtor's agent the agent's cheque for the amount of the debt, and did not present it for payment for nearly four weeks. When presented it was dishonored, but there was a reasonable chance, though not a certainty, that it would have been paid if presented at once. The debtor, a week after the cheque was made, paid his agent a part of the amount, the rest being in the agent's hands already. The agent absconded. *Held*, that the debtor was discharged —*Hopkins* v. *Ware*, L. R. 4 Exch. 268.

Chose in Action—*See* Bond; Executor and Administrator, 2.

Codicil—*See* Revocation of Will, 2; Will, 8.

Collision.

1. In a case of collision, the vessel proved entitled to redress set forth the relative position of the two vessels incorrectly in her pleadings. Both vessels were at anchor at the time of the accident, and there was no ground for the objection that the other side might have been misled. *Held*, that the rule that a party seeking redress for an injury must recover *secundum allegata et probata* did not apply.—*The "Alice" & The "Rosita,"* L. R. 2 P. C. 214.

2. In a case of collision occasioned by the fault of a vessel under compulsory pilotage in going at too great speed, where no contributory negligence on the part of the master or crew is proved, the owners of the vessel are not liable. (See *G. S. N. Co.* v. *B. & C. S. N. Co.* (Exch. Ch.), L. R. 4 Exch. 238.)

*Semble*, said owners not having adhered to the appeal from the decree that their vessel was wholly in fault, but that they were not liable on the above ground, could not raise the questions whether their vessel was free from blame, or whether both vessels were equally in fault.—*Moss* v. *The African Steamship Co. The "Calabar,"* L. R. 2 P. C. 238.

3. The maritime lien on a French vessel for damages caused to an English vessel by collision is not discharged by a sale without notice under the French bankrupt laws to a purchaser who did not know of the collision — *The Charles Amelia*, L. R. 1 Adm. & Eccl. 330.

Colony—*See* Conflict of Laws.

Common Carrier—*See* Carrier.

Common, Tenancy in—*See* Tenancy in Common.

Company.

1. When one who has been induced to become a shareholder in a company by a fraudulent prospectus has filed a bill to have his name removed from the list of members, his right to this will not be affected by a subsequent order for the winding-up of the company.—*Reese River Silver Mining Co.*, v. *Smith*, L. R. 4 H. L. 64.

2. The articles of a company formed for running the blockade during the war in America provided that dividends should not be paid except out of profits, and that the directors should declare a dividend as often as the profits in hand were sufficient to pay five per cent on the capital, subject to the resolutions of a general meeting. In 1864, a dividend was declared, and sanctioned at a general meeting, and subsequently paid, upon a balance sheet in which a debt due from the Confederate government, and a guarantee by the same of part of the value of ships lost in blockade-running, and cotton in the Confederate States, were estimated at their full nominal value. The balance sheet was submitted to the creditor now complaining of it, and advances were made by him, after inspecting it, out of which the dividend was paid. All the above assets were lost and the company was wound up. *Held*, that as the estimate was made *bona fide*, and the facts were plainly stated in the balance sheet, the dividend was to be considered as made out of profits, and not as delusive—*Stringer's Case*, L. R. 4 Ch. 475.

3. Company C., formed to construct railways, &c., ordered rails of Company E. by letter. Said rails were intended to be used in the construction of a railway which had been undertaken by a firm to which the managing director of C. belonged, but not by the company. The managing director of E. was also a director of C. The rails were made but not delivered, as C. became bankrupt. *Held*, that the order was binding on C., although not under seal, and whether the managing director of E. knew the purpose for which the rails were to be used or not; and that E. could prove for damages caused by C.'s non-acceptance of the rails —*In re Contract Corporation. Claim of Ebbw Vale Company*, L. R. 8 Eq. 14.

4. The chairman of the directors of a company was authorised by them to accept bills drawn on the company by L., on L.'s depositing securities to a certain amount. The chairman accepted such bills with the knowledge of the directors, but securities of the specified amount had not in fact been deposited. *Held*, that the company was bound.—*In re Land*

*Credit Co. of Ireland. Ex parte Overend, Gurney & Co.*, L. R. 4 Ch. 460.

*See* Landlord and Tenant, 2; Libel, 2; Statute, 1.

Composition Deed—*See* Bankruptcy, 6.

Condition—*See* Company, 4; Contract; Devise, 1; Insurance, 2; Mortgage, 1.

Conditional Limitation—*See* Forfeiture; Perpetuity.

Confidential Relation—*See* Bond; Trust, 8; Will, 12.

Conflict of Laws.

The legislature of Jamaica passed an act indemnifying the defendant in respect of all acts done by him in suppressing of the rebellion in that island, and this act was assented to by the defendant in his capacity of governor. He was subsequently sued in England for trespasses which were within said act. *Held*, that the act was a bar to the suit, and that his having aided in its enactment, as above, made no difference.—*Phillips* v. *Eyre*, L. R. 4 Q. B 225.

*See* Collision, 8.

Confusion—*See* Trust, 4.

Consideration—*See* Bond; Illegal Contract; Landlord and Tenant, 2.

Construction of Instruments and Statutes—*See* Carrier, 1, 2; Charity, 2; Contract; Copyright; Court; Covenant, 2; Deed; Devise, 1; Executor and Administrator, 1; Forfeiture; Insurance; Legacy; Mortgage, 2; Parliament; Perpetuity; Power; Statute; Succession Duty; Will, 7–14.

Contempt—*See* Production of Documents.

Contingent Interest—*See* Bankruptcy, 8.

Contract.

Plaintiff shipped under articles drawn in pursuance of the Merchant Shipping Act, 1854, for a voyage from Shields to Alexandria, and, if required, to ports in the Mediterranean, Black Sea, Danube, &c., and home to the final port of discharge in Europe; the voyage not expected to exceed twelve months. "In consideration of which service to be duly performed," he was to receive 5*l.* 10*s.* wages per month. During the voyage the plaintiff was guilty of drunkenness and insubordinate conduct, and by his own negligence only he was left behind at a port on the Danube. He did not, however, desert. *Held* (*Per* Byles & Montague Smith, JJ.), that plaintiff was entitled to recover wages up to the time when he was left behind. (*Per* Brett, J.) that construing the articles with the Act, performance of, or readiness to perform the stipulated services throughout the whole voyage was a condition precedent to the right to wages.—*Button* v. *Thompson*, L. R. 4 C. P. 330.

*See* Company, 1, 3, 4; Damages; Illegal Contract; Landlord and Tenant, 2; Sale; Vendor and Purchaser of Real Estate.

Contribution—*See* Devise, 2.

Copyright.

Under the Copyright Act (5 & 6 Vict. c. 45), the assignor of a copyright may retain copies of the work, and may sell them after his assignment, unless there is a contrary stipulation—*Taylor* v. *Pillow*, L. R. 7 Eq. 418.

Corporation—*See* Company.

Costs—*See* Executor and Administrator, 4; Mortgage, 2; Nuisance, 1, 2; Partition.

Court.

Under a statute appointing certain officers commissioners of oyer and terminer, and empowering "any two or more of them to inquire of, hear, determine, and adjudge" certain offences, only one member of the commission need actually sit at the trial, if another member is sitting at the same sessions, though in another court.

*Per* Mellor, Lush & Hayes, JJ., Cockburn, C.J., *Dissentiente*, if a second judge were required, the same one need not be present through the whole trial.—*Leverson* v. *The Queen*, L. R. 4 Q. B. 394.

Covenant.

1. One who takes an underlease is bound by all the covenants in the original lease.—*Feilden* v. *Slater*, L. R. 7 Eq. 523.

2. The sale of spirits in bottles by a grocer is a breach of a covenant that premises shall not be used "as an inn, public-house, or taproom, or for the sale of spirituous liquors."—*Ib.*

*See* Easement; Trust, 1.

Creditor—*See* Executor and Administrator, 2; Fraudulent Conveyance.

Criminal Law—*See* Assault; Court; Death, 1; Evidence, 2; Writ of Restitution.

Curtesy—*See* Bankruptcy, 8.

Custom—*See* Sale, 2, 6.

Damages.

A. purchased jute, to be at the risk of the sellers till the prompt day. A. paid a deposit, and received the warehouseman's weight notes from the seller. These A. deposited with B. as a security for advances made to A. by C., and B. agreed to hold them for C. The jute having been destroyed by fire before the prompt day, B. gave up the notes to A. without authority from C, and A. gave them to the seller, and thereupon obtained back the deposit. A. subsequently became insolvent, and failed to repay C. his advances. C. sued B. for his breach of contract in giving up the notes to A. *Held*, that C. was entitled to substantial and not merely nominal damages. (Exch. Ch.)—*Matthews* v. *Discount Corporation*, L. R. 4 C. P. 228.

*See* Proximate Cause; Vendor and Purchaser of Real Estate.

**Death.**

1. On a trial for bigamy, it was proved that the prisoner married A. in 1836, left him in 1843, and married again in 1847. Nothing had been heard of A. since the prisoner left him, but there was no evidence leading to the inference that A. had died. *Held*, that there was no presumption of law that A. was alive at the date of the second marriage.—*The Queen* v. *Lumley*, L. R. 1 C. C. 196.

2. A person entitled to dividends payable in April and October, for which he was in the habit of applying punctually, and on which he mainly depended for support, was last seen in August, 1860, without money and in bad health, and did not draw his October dividend. Seven years having elapsed: *Held*, that on the above facts it was to be presumed that he died before November 14, 1860.—*In re Beasney's Trusts*, L. R. 7 Eq. 498.

**Declaration**—*See* Evidence, 1, 2.

**Decree**—*See* Mortgage, 2.

**Deed.**

1. On the marriage of A., tenant for life of X. estate, with remainder to his first and other sons in tail male, a fund was settled (in case there should be children other than an eldest, second, or only son, for the time being entitled to X. estate, for an estate in tail male in possession, or remainder immediately expectant on A.'s death) on such children, after the death of A. and his wife, as A. should appoint, and, in default of A.'s appointment, equally. C., the eldest son of the marriage, joined with A. in barring the entail, and resettling X. estate to A. for life, then to C. for life, with remainder to C.'s sons successively in tail, remainder to C.'s heirs. A. died, having appointed half only of the fund. *Held*, that A.'s death was the period for ascertaining whether C. was excluded from a share in the fund, but (reversing decision of Wood, V.C.) that C., having had the benefit intended, notwithstanding the resettlement of X. estate, was excluded.—*Collingwood* v. *Stanhope*, L. R. 4 H. L. 48; s. c. L. R. 4 Eq. 286; 2 Am. Law Rev. 467.

2. A fund was settled after A.'s death on A.'s child J. and A.'s future children, and in case either of them should happen to be dead leaving issue, to such issue, equally to be divided amongst them or their issue respectively, to each being a son at twenty-one, being a daughter at twenty-one or marriage. In case J. or other child should die without issue before his share should become "due and payable," such share to survivors and issue of deceased child equally, when and as their original shares should become "due and payable." If at A.'s death neither J. or other child, nor issue of J. or other child, were living, or if all should die before their shares were "payable, then" over. The trustees had a power of advancement. J. died without issue, living A. *Held*, that J.'s share was divested, and went to the survivors.—*In re Wilmott's Trusts*, L. R. 7 Eq. 532.

*See* Landlord and Tenant, 1; Mortgage, 2; Separation Deed; Trust, 1.

**Demand**—*See* Award, 2.

**Desertion.**

1. A husband left his wife, and the two immediately afterwards executed a separation deed. The husband soon ceased paying the allowance which he had covenanted to pay. *Held*, that the separation, being under the deed, was and continued voluntary, and was not desertion; and the husband's breach of his covenant did not make it so.—*Crabb* v. *Crabb*, L. R. 1 P. & D. 601.

2. A husband and wife were cohabiting in Jamaica, where the husband held an appointment, when the wife was obliged to come to England for her health. Afterwards, in 1851, the husband asked her to return, and provided funds for her passage, but she wrote that her health did not permit it. In 1856, he made her an allowance, which he stopped in 1860. She had made no offer to return since refusing his request. *Held*, that he had not deserted her.—*Keech* v. *Keech*, L. R. 1 P. & D. 641.

**Devise.**

1. W. devised to his brothers, A., B., and C., thus: to A. "for life, and in default of his having issue living at the time of his death, to B. for life, and in default of his having issue living at the time of his death, to C. and his heirs; but in case A. should die leaving issue," to such issue in tail male. "And *in case B. should come to the possession* of the said estate hereinbefore limited to him, and should die leaving issue, said issue to take in like manner" as before limited to the issue of A. B. died in the lifetime of A., leaving a son who

survived A. A. died without issue. *Held*, that B.'s son took under the will. B.'s coming into possession was not a condition precedent. *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35.

2. Estates A. and B., subject to the same mortgage, were devised, A. specifically, and B. by a residuary clause. *Held*, that the residuary devise was specific, and that the two estates must bear the mortgage debt ratably.—*Gibbins* v. *Eyden*, L. R. 7 Eq. 871.

*See* CHARITY, 1, 2; EXECUTOR AND ADMINISTRATOR, 4; FORFEITURE; LEGACY; PERPETUITY; WILL, 7–14.

DISCLAIMER—*See* MORTGAGE, 8.

DISCOVERY.

1. A defendant who has answered cannot avoid discovery, for the purpose of the suit, on the sole ground that it is the same which is the only object of the suit.—*Chichester* v. *Marquis of Donegal*, L. R. 4 Ch. 416.

2. A. filed a bill against B., who had been his partner, alleging that B. had represented a good debt to be bad, and praying that the agreement of dissolution might be set aside, or that B. might be ordered to pay one half of his receipts on account of said debt, and also for an account. The interrogatories asked B. to set forth his said receipts and the partnership accounts. B. answered that a patent had been assigned to him on account of said debt, and that after much litigation at his own expense connected with the same, he expected to receive from it more than the amount of the debt; and as to the accounts, that they were very long, and could only be given by employing an accountant on the books, which were always open to A. *Held*, that the answer was sufficient.—*Lockett* v. *Lockett*, L. R. 4 Ch. 336.

DISCRETION—*See* CHARITY, 8.

DISQUALIFICATION—*See* PARLIAMENT.

DIVORCE—*See* ALIMONY; DESERTION.

DOMICILE.

If a man is imbecile on attaining his majority, and remains so continuously until his death, his father retains the right of choice of his domicile as long as he lives.—*Sharpe* v. *Crispin*, L. R. 1 P. & D. 611.

DOWER—*See* ELECTION.

DYING DECLARATIONS—*See* EVIDENCE, 2.

EASEMENT.

A. sold land to plaintiff, reserving a rent, to secure which plaintiff covenanted to build, and built accordingly. A. afterwards sold adjoining land to defendant, who drained the same, in consequence of which plaintiff's land lost the support of subterranean water, and subsided. It would have done so even if it had been unbuilt upon. *Held*, that defendant was not liable. (Exch. Ch.)—*Popplewell* v. *Hodkinson*, L. R. 4 Exch. 248.

*See* LIGHT; NUISANCE, 8; STATUTE, 7; WAY.

ELECTION.

A testator left his wife, among other things, property to which she was entitled in her own right, and an annuity charged on the L. estate in lieu of dower. The wife during her life took what was given her by the will, but never elected to take under or against it. She died intestate, leaving four next of kin, three of whom elected to take under the will, while the fourth, the heir and administrator, elected against it. *Held*, that the election of the three did not bind the fourth, nor that of the fourth the three. In taking the accounts, the fourth was to bring in the annuity, and to be allowed one-fourth of the dower in lieu of which it was given.—*Fytche* v. *Fytche*, L. R. 7 Eq. 494.

EQUITY—*See* ACCOUNT.

EQUITY PLEADING AND PRACTICE.

Service of a petition for vesting in new trustees lands which had descended to the infant heirs of the former sole trustee, upon the guardian of said heirs, is unnecessary.—*In re Little*, L. R. 7 Eq. 823.

*See* DISCOVERY; EVIDENCE, 8; FRAUDULENT CONVEYANCE, 2; INTERPLEADER; MORTGAGE, 2; NUISANCE, 1, 2; PLEDGE; PRODUCTION OF DOCUMENTS; REVIVOR; WARD OF COURT.

ERROR.

An arbitrator was required by the order referring the cause to him to state a case for the opinion of the Court of Exchequer, at the request of either party; he stated a case accordingly, which was heard and decided by the Court. *Held*, that this decision was not a judgment on which error could be brought.—*Courtauld* v. *Legh*, L. R. 4 Exch. 187.

ESTOPPEL—*See* CHARITY, 3; LANDLORD AND TENANT, 1.

EVIDENCE.

1. A declaration or written entry by a deceased person, who had, at the time of making the same, occupied a house four years, that he was tenant of said house at so much rent, and had paid it, is admissible to prove the payment as well as the tenancy.—*The Queen* v. *Exeter*, L. R. 4 Q. B. 341.

2. Thirteen hours before the death of a murdered person, she made a declaration upon oath. She was asked, "Is it with the fear of death before you that you make these statements? Have you any present hope of your recovery?" She said, "None." Her

statements were written out, together with the above, but the word "present" was omitted from before "hope." The written statement was then read to her, and, at her suggestion, the words "at present" were inserted, thus: "with no hope *at present* of my recovery." It was then signed by her. *Held*, that the declaration was not admissible. It did not appear that the deceased was absolutely without hope.—*The Queen* v. *Jenkins*, L. R. 1 C. C. 187.

3. When an affidavit is made before a notary abroad, the signature of the notary must be verified before the affidavit can be admitted. *In re Davis's Trusts*, L. R. 8 Eq. 98.

Execution—*See* Fraudulent Conveyance, 2.

Executor and Administrator.

1. The court allowed one who had been appointed an executor, and had renounced that office, to take administration with the will annexed, notwithstanding a rule that no person who had renounced in one character should take a representation to the same deceased in another character.—*Goods of Russell*, L. R. 1 P. & D. 634.

2. A female took administration of the estate of the deceased as a creditor, got in a large part of the estate and paid some of the debts, and then married and died. The husband had taken possession of leaseholds, part of said estate, but no fund had been set apart for the payment of the wife's debt. *Held*, that administration of the unadministered effects of the deceased could not be taken by the husband in his own right as a creditor, but only as representative of his wife.—*Goods of Risdon*, L. R. 1 P. & D. 637.

3. A testator made two persons his executors and also the trustees of the residue of his estate, part of which consisted of a bond given by the trustees of a minor. The latter on coming of age, within a year of testator's death, gave his bond to said executors jointly, in place of the bond of his trustees. Ten years afterwards, the obligor of the substituted bond paid part of the money to one of the obligees, who signed a receipt himself, and forged the signature of his co-obligee, and embezzled the money. *Held*, (1) that the obligor was discharged by the receipt of one executor, though he meant to have that of both; (2) that the acceptance of the substituted bond by the executors was not a breach of trust; (3) that the lapse of ten years was not of itself notice to the obligor that the estate had been administered and the executors had become trustees.—*Charlton* v. *Earl of Durham*, L. R. 4 Ch. 433.

4. A testator devised all his real estate upon certain trusts. Some of the gifts lapsed to the heir. The personalty was insufficient to pay the debts. *Held*, that the lapsed shares must go first to pay the costs of administration.—*Row* v. *Row*, L. R. 7 Eq. 414.

*See* Revocation of Will, 2, 3.

Executory Devise—*See* Forfeiture; Perpetuity.

Forfeiture.

A testator appointed some and devised other real estate to his wife and her assigns during her life, and, after her death, to his son in fee, with a proviso that if his wife should do any thing whereby she should be deprived of the control over the rents and profits, so that her receipt alone should not be a sufficient discharge for the same, her estate should determine as effectually as it would by her actual decease. By a first codicil, he appointed and devised his said estate, after the death of his wife, to his son for life, with remainders over. By a second, he gave his personal estate to his wife for life, for her separate use, independently of any future husband. The wife married again without making any settlement. *Held*, that her interest was forfeited, in spite of the word "assigns" and the allusion to a second husband, and that the remainders limited by the codicil, both in the appointed and devised estates, were accelerated.—*Craven* v. *Brady*, L. R 4 Ch. 296; s. c. L. R. 4 Eq. 209; 2 Am. Law Rev. 276.

*See* Mortgage, 3.

Fraud—*See* Bond; Company, 1, 2; Partnership, 1; Will, 12.

Fraudulent Conveyance.

1. When a man executed an antenuptial settlement and married a woman with whom he had previously cohabited, with intent to defraud his creditors, the wife being implicated in the transaction: *Held*, that the settlement was void as against creditors.—*Bulmer* v. *Hunter*, L. R. 8 Eq. 46.

2. January 23, 1867, an examination of defendant's conduct as chairman was begun. February 13, he settled all his property on his children, with power to the trustees to pay him such part of the income as they might think fit. May 6, an order was made against him. *Held*, that the conveyance might be set aside at the suit of creditors having no lien on or order charging the property conveyed, the bill to be brought on behalf of all the creditors. Independent proceedings were necessary for

the creditors to have execution against such property.—*Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347.

3. Land was settled on A. for life, remainder to his son B. in fee, if living at A.'s death, with power to A. and B. to revoke the above and appoint new uses. B. becoming insolvent, A. and B. by deed revoked the uses in B.'s favor and appointed the estate to such uses as A. should appoint, and, in default of appointment, to the use of B. absolutely. B. was afterwards adjudicated bankrupt, and the assignees sought to set aside said deed as fraudulent. A. was enjoined, on motion, from exercising his power under said deed in favor of a purchaser for value, but not from doing so in favor of volunteers.—*Beyfus* v. *Bullock*, L. R. 7 Eq. 391.

Frauds, Statute of—*See* Landlord and Tenant, 1.

Governor—*See* Conflict of Laws.

Guaranty—*See* Bankruptcy, 6; Sale, 2.

Guardian—*See* Equity Pleading and Practice; Revocation of Will, 2.

Heir and Personal Representative—*See* Marshalling of Assets; Power.

Husband and Wife—*See* Alimony; Death, 1; Divorce; Executor and Administrator, 2; Fraudulent Conveyance, 1, 2; Separation Deed; Ward of Court; Wife's Equity.

—*American Law Review.*

## REVIEWS.

Blackwood's Edinburgh Magazine, December, 1869. The Leonard Scott Publishing Company, 140 Fulton Street, New York.

We receive the Leonard Scott Publishing Company's Reprints of the British Periodicals with great regularity. In our advertizing columns will be found the advertisement of these Periodicals for the year 1870. And we beg to call the attention of such of our readers as are not yet subscribers to the Periodicals in the advertisement. Money spent in subscribing for them is well spent. In England the Periodicals are so expensive that few can afford to take all of them. But owing to arrangements which the Leonard Scott Publishing Company have made with the English Publishers for the receipt of advance sheets, the reprints are published nearly as soon as the originals are issued in England, and on terms so low, that nearly all the reprints can be obtained at little more cost than that of one Review in England. Fifteen dollars per annum will enable a person here to procure Blackwood and the four Reviews. No man in America who cares anything for the literature of the day should be without the Reviews. The contributors consist of the best talent that Great Britain can produce, either in science, art, religion or general literature. The field which they traverse is far more extensive than anything of the kind attempted in the United States. The contents of American Reviews, compared with the English Periodicals, are meagre and barren. Each of the English Reviews has its own peculiar characteristics. Blackwood is so well and so widely known that it demands little notice from us. The reputation which it has acquired for literary sketches and narratives it preserves pure and untarnished. The Edinburgh still continues the even tenor of its way. The London Quarterly, which was started in opposition to it, still continues the opposition with much pluck and vigor. The Westminster, which by some is not considered orthodox, still continues its career of advanced religious literature. And the North British, without being so offensive to orthodox thinkers as the Westminster, has much to recommend it to the enlightened attention of a wide sphere of readers. The man would be fastidious indeed, who could not find in these Periodicals, or some of them, much to please, and much to learn. The variety afforded is so great as to tempt men of all minds be they ever so different in their idiosyncrasies. In the reading of them one cannot help admiring the advanced thought and its powerful expression which he finds in their pages. No man of culture, of any pretension whatever to literary talents should be without them or any of them.

## GENERAL CORRESPONDENCE.

### *Noncupative Wills.*

To the Editors of the Law Journal.

Guelph, Jan. 4th, 1870.

Gentlemen,—Is it essentially necessary that a will of personal estate should be in writing? In England it is rendered necessary by the statute of 7 Wm. 4 and 1 Vict., but I cannot find that any such statute has been passed here, and therefore I conclude that a will of personalty may still be made by word of mouth, subject of course to the requirements of the Statute of Frauds.

Yours, &c.,

Subscriber.

[Our correspondent should make himself more familiar with Statute Law. See Con. Stat. U. C. cap. 16, sec. 33.]—Eds. L. J.

### *Costs—Certificate.*

To the Editors of the Law Journal.

Gentlemen,—The 143rd Rule relating to Division Courts, made in pursuance of the County Court Amendment Act, 1857, provides: "In any action of the proper competence of a Division Court, it shall not be a sufficient ground to certify at the trial thereof that it is a fit cause to have been withdrawn from a Division Court and commenced in a County Court, or for a County Court Judge to order the allowance of any other than Division Court costs, that the Defendant or Defendants, or any of them, had removed out of the Division or County in which the debt was contracted, or the cause of such suit or action accrued into any other Division or County, or elsewhere out of such County," &c.

Supposing a debter, to the extent of $40, residing out of the jurisdiction, say Detroit, and the creditor is consequently compelled, if he sues at all, to resort to the County Court; that he obtains the usual judge's order, on affidavit, to effect service by posting up copies in the clerk's office, &c., and he ultimately signs judgment as for want of a plea, the damages being assessed in the manner pointed out in said order; does the above clause in the County Court Rules restrict the Plaintiff's costs to the Division Court Tariff.

If this question may legitimately be addressed to you, an answer will confer a favor upon a number of Law Students, besides

A Subscriber.

[This scarcely comes within our province to answer, but probably some of our readers will discuss the point. Though we cannot undertake to answer all questions on points of law or practice, our columns are always open to free discussion by the profession.—Eds. L. J.]

## CHANCERY SPRING SITTINGS, 1870.

| | | | |
|---|---|---|---|
| *The Hon. Vice Chancellor Strong.* | | | |
| Toronto.................... | Tuesday....... | March | 15. |
| *The Hon. Vice-Chancellor Mowat.* | | | |
| Stratford.................... | Tuesday........ | April | 5. |
| Goderich.................... | Friday........ | " | 8. |
| Sarnia.................... | Tuesday........ | " | 12. |
| Sandwich.................... | Friday........ | " | 15. |
| Chatham.................... | Tuesday........ | " | 19. |
| London.................... | Tuesday........ | " | 26. |
| Woodstock.................... | Saturday...... | " | 30. |
| Simcoe.................... | Friday........ | May | 6. |
| *The Hon. the Chancellor.* | | | |
| Hamilton.................... | Tuesday....... | April | 12. |
| Brantford.................... | Thursday...... | " | 21. |
| Lindsay.................... | Thursday...... | " | 28. |
| Guelph.................... | Thursday...... | May | 5. |
| Owen Sound.................... | Thursday...... | " | 12. |
| Barrie.................... | Monday........ | " | 16. |
| St. Catharines.................... | Friday........ | " | 20. |
| Whitby.................... | Friday........ | June | 3. |
| *The Hon. Vice-Chancellor Strong.* | | | |
| Ottawa.................... | Thursday...... | May | 5. |
| Cornwall.................... | Tuesday....... | " | 10. |
| Brockville.................... | Tuesday....... | " | 17. |
| Kingston.................... | Friday........ | " | 20. |
| Belleville.................... | Thursday...... | " | 26. |
| Peterborough.................... | Wednesday... | June | 1. |
| Cobourg.................... | Monday........ | " | 6. |

## APPOINTMENTS TO OFFICE.

*(From the Canada Gazette.)*

JUDGES.

The Hon. JOHN GODFREY SPRAGGE, of the City of Toronto, in the County of York, to be Chancellor of the the Court of Chancery for Upper Canada, now Ontario, in the stead of the Hon. P. M. M. S. VANKOUGHNET, deceased. (Gazetted January 1st 1870.)

SAMUEL HENRY STRONG, of the City of Toronto, in the County of York, Esq., Q.C., to be one of the Vice-Chancellors of the Court of Chancery for Upper Canada, now Ontario, in the stead of the Hon. J. GODFREY SPRAGGE. (Gazetted January 1st, 1870.)

*(From the Ontario Gazette.)*

DEPUTY CLERK OF THE CROWN, &c.

JAMES C. MORROW, of Barrie, Esq., to be Deputy Clerk of the Crown and County Court Clerk for the County of Simcoe, in the stead of JONATHAN LANE, Esq., deceased.

NOTARIES PUBLIC.

A. G. McMILLAN, of Elora, Gentleman, Attorney-at-Law; FREDERICK ARTHUR READ, of Petrolia, Esq., Barrister-at-Law; and HORACE THORNE, of Toronto, Esq., Barrister-at-Law. (Gazetted January 1st, 1870.)

CHARLES GREAM, of the Village of Madoc, Esquire. (Gazetted January 15th, 1870.)

JAMES A. MACPHERSON, of the Village of Kincardine, Esq. (Gazetted January 29th, 1870.)

ASSOCIATE CORONERS:

WILLIAM LINDSAY, of Napier, Esq., to be an Associate Coroner within and for the County of Middlesex. (Gazetted January 8th, 1870.)

JOHN MILTON PLATT, of Picton, Esq., M.D., to be an Associate Coroner within and for the County of Prince Edward. (Gazetted January 22nd, 1870.)

## DIARY FOR FEBRUARY.

1. Tues. Last day for Co. Tr. to furnish to Clks of Mu. in Coun's lists of land liable to be sold for taxes.
2. Wed. *Purification of B. V. M.* Meet. Gr. Sch. Board.
4. Fri... Exam. of Law Students for call to the Bar.
5. Sat... Exam. of Articled Clerks for certificate of fitness.
6. SUN. *5th Sunday after Epiphany.*
7. Mon. Hilary Term begins.
9. Wed. Last day for service for Co. Ct. York. Interim Exam. of Law Stnd. and Art. Clks. New T. Day, Q. B. Last day for setting down and giving notice for rehearing. New T. D., C. P.
11. Fri. . Paper Day, Q. B. New Trial Day, Common P.
12. Sat... Paper Day, C. P. New Trial Day, Queen's B.
13. SUN. *Septuagesima.*
14. Mon. *St. Valentine.* P. Day, Q. B. N. T. Day, C. P.
15. Tues. Paper Day, C. P. New Trial Day, Queen's B.
16. Wed. Paper Day, Q. B. New Trial Day, Common P.
17. Thur. P. D. C. P. Re-hearing Term in Chancery com.
18. Fri. . New Trial Day, Queen's Bench.
19. Sat. . Hilary Term ends. Dec. for County Ct. York.
20. SUN. *Sexagesima.*
24. Thur. *St. Matthias.*
27. SUN. *Quinquagesima.*
28. Mon. Last day for Notice of Trial County Court, York.

THE

# The Canada Law Journal.

FEBRUARY, 1870.

## CHANCERY REFORMS.

Without at all admitting that alterations in procedure or any improvement in the official staff will work an effectual reform in our Court of Chancery, or that our system of distinct tribunals of law and equity is the best, or is, or is not capable of improvement, it is obvious enough that until organic changes are determined upon, the best must be made of the present system, so that all reforms necessary to improve details in the existing procedure should be carried out by the court, if competent for the purpose, or by the Legislature, after full examination and upon accurate knowledge of the evils and defects.

It is upon this ground that we now approach the subject of Chancery Reform. To this matter the attention of the public and the legal profession has recently been directed by discussions in the public press, resulting from a movement set on foot by a large number of the practitioners in the Court of Chancery to secure greater efficiency in the working out of the various details of the practice of that Court; but unfortunately it cannot be doubted that the lay press has approached the subject in a manner betraying too clearly on all sides the presence of a spirit not conducive to a calm or healthy consideration of a very important matter.

A large number of those doing business in the Court of Chancery have for some time past made great complaints as to the way in which the responsible duties pertaining to the various offices of that Court have been performed; and that many needless delays and much consequent expense have been occasioned to suitors, as well by reason of the shortcomings of the officers, as by the apparently unnecessary and useless routine, which has been enforced in regard to many simple but important matters of practice.

We are therefore not surprised to find that a number of the practitioners of the Court of Chancery have called the attention of the judges to the subject by a petition adopted at a meeting, and subsequently presented to the judges of the Court; and we are glad to hear that the judges have signified their intention to give due consideration to the matters complained of, and to the suggestions of the deputation who presented the petition on behalf of the meeting. We have every confidence that the judges having taken the matter in hand will address themselves to the subject with that energy and ability which has always characterised our judiciary, and that the needed reforms will be carried out so far as practicable.

As to the wording of the petition itself, the constitution of the meeting where it was discussed, and the manner in which the subject was handled at the meeting, there are many opinions, some of them not very complimentary to some of the parties concerned. But, though this may be mentioned as an incident connected with the inception of the proceedings, it is not material to our purpose further to allude to it, and we shall now proceed to discuss the chief causes of complaints referred to in the petition.

They concern—1st, the Master's office; 2nd, the Registrar's office; and 3rd, the Secretary's office. The importance of having the office of Master filled by a man of ability as well as strict integrity will be admitted by every one who is at all aware of the duties discharged by that officer. He is not a mere ministerial officer; he is a *judicial* officer. Nor are the questions disposed of by him of a trifling character. Many thousands of pounds are frequently involved in the references submitted to his judgment. He is daily called upon to hear and weigh evidence often submitted without a thorough examination, and under circumstances which render it more than ordinarily difficult justly to estimate its value. He should be well versed in the principles which govern our court, and be prompt in the despatch of business. Without a personal knowledge of the facts we are unable to say whether the present incumbent of that office possesses all these qualifications, but a decided opinion to the contrary has been pronounced by those who ought to know, and who would naturally be reluctant to complain without good cause. It is charged that the great delays and costs of proceedings in that office are attributable to the present Master, whose advance in years has greatly impaired his usefulness; and it will be remembered that some twelve or thirteen years ago the profession addressed the Court to much the same effect as they have now, and in consequence of the action then taken by the Bar, the late Mr. Hemings was appointed taxing officer to relieve the Master of certain duties then devolving upon him. It is now urged, after a trial of many years, that the Master's office is not yet efficiently conducted, but on the contrary, that it is worse than ever.

It is also stated that the Registrar has not devoted that attention to his office which he should have given to it. Not so important as the duties of Master, the business assigned to the Registrar nevertheless calls for a good know ledge of equity, for the preparation of the decrees and orders pronounced by the Court devolves upon him; and, above all, he should be systematic and regular in the discharge of his duties. The profession practising in the Court, whilst allowing that the present Registrar possesses quite sufficient ability, contend, and apparently with some shew of fairness, that there is ground for complaint as to the manner in which this office has hitherto been conducted; and that more regularity and a more efficient system might be introduced to great advantage. The decrees and orders of the Court should be drawn up by the Registrar instead of the solicitors or counsel engaged in the causes as at present. There is no system observed in delivering papers which have been in the hands of the judges for the preparation of their judgment; briefs, deeds, evidences, and exhibits (which are not filed in Chancery as they are in Common Law Courts), are handed out to the first applicant, and in this way we have heard of many valuable deeds and papers going astray. There is no record kept of judgments as delivered; and the judgments when delivered are not preserved in any regular manner.

Perhaps the cause of complaint most frequently urged is against the needless difficulties thrown in the way of suitors and others entitled to moneys at their credit in the Court. It is impossible to get money out of Court within two or three days, or sometimes weeks from the first application for it, even after the decree or order has been pronounced for its payment. The decree has to be drawn, settled, passed, stamped, signed, entered, examined, issued, then entered in the ledger; after which the cheque is drawn, stamped, signed by the ledger keeper, then by the Registrar, and finally by a judge. Each of whom are required to make an examination into the account, and to have a full explanation; frequently there is difficulty in finding some of these disengaged (if in town), so as to receive explanations, and the delays consequent upon this routine are certainly trying to the unfortunate man who is kept waiting for his own. All this delay and consequent expense is unreasonable; one competent person should be appointed (from whom satisfactory security might be required), whose duty it should be to see to the payment out of court of moneys to the person entitled to the same, and there should be no more delay or trouble in securing money in court than if it were deposited in the bank in the ordinary way. With an officer who can be trusted, what object is there in requiring more than his signature, and what necessity is there to trouble our over-tasked judges with this detail of practice.

The objection urged against the Secretary's office is solely against the principle, that the judgment is pronounced by a judge who has not heard the argument, but only so much of it as can be remembered, retailed and diluted by the Secretary, before whom the case or question has been argued. It is but seldom that the Secretary can see a judge upon the same day upon which the case was argued. Frequently a week elapses, and sometimes several weeks intervenes before the judge can hear what the Secretary's memory will enable him to repeat of the views argued before him Even with the present painstaking Secretary such a system must work much injustice.

In England, where the Judges Secretary disposes of questions of practice, it is the invariable rule that he submits the same to the judge as soon after the argument, on the *same day*, as he is able to wait upon him; and the former will not hear cases except upon a day on which he can see the judge and submit the argument for his decision.

We should be glad, either to see such a system adopted in this country, or to have power conferred upon the Judges Secretary to dispose of questions argued before him, giving him jurisdiction analogous to that of the Clerk of the Court of Queen's Bench in Common Law Chambers, and if necessary with somewhat the same restrictions; and thus a vast number of applications might be disposed of promptly, which are now delayed to await the convenience of a judge.

Coming from such authority, these important complaints deserve the attention of the judges; and the charges preferred against the officers of the court call for some action on the part of the government. We think it would not be unwise in the government to appoint a commission of competent men, who could enquire into all the facts and offer their suggestions as to any changes they might deem advisable, either in the systems pursued in the various offices, or in the officials having charge of the same.

No doubt much care would be required in the selection of the commissioner or commissioners —knowledge, ability and freedom from prejudice or irregular influences would be necessary. But the government may very well be trusted with this selection, and we doubt not it would be made with a single eye to the public good.

## COMMON LAW CHAMBERS.

The rules required to bring into full operation the recent Act of the Local Legislature were promulgated during Hilary Term.

These rules are founded on the English rules provided for a similar statute, but give the Clerk of the Queen's Bench somewhat more extended powers than are held by the officer holding the analogous position in England. By these rules the Clerk here has, in the cases excepted from his adjudication, power to grant summonses (except only when the liberty of the subject is concerned), whilst in England he would not. The rules do not exempt proceedings under the Municipal Act to contest the validity of elections, though in such cases the decision is final and conclusive, and there would seem to be as much reason for excepting cases of this kind as some others, for example, referring causes under the Common Law Procedure Act. Such matters as appeals in insolvency and the removal of causes from inferior courts are, we presume, excepted, as the effect would otherwise be to give the Clerk appellate jurisdiction over the County judges. Our present inclination, however, would not be to see the powers of the officer presiding in Chambers curtailed, but rather the reverse, provided always that the appointment is, from time to time, made with special reference to the duties assigned under the new system, for we can well fancy, that there will be occasionally some inconvenience felt by the same person not having jurisdiction in one case as well as another. Whether we may always expect a person in the position of Clerk of the Queen's Bench as capable of filling the new quasi judicial position as the present clerk is another matter. But the rules are intended, not for the present only, but to meet future contingencies as well.

We had hoped to have seen some provision made in the rules for fees to counsel on arguments in Chambers. We know of no case where the injustice of the present tariffs is so apparent as here. The fees for business in Chancery Chambers are nearly double those taxable for similar services on the Common Law side, and we do not hear that the former are too large; and if there is reason for asking an increase in the "west wing," there is, at least in this respect, twice the reason for an increase in Common Law Chambers.

Something ought to be done, and if necessary the matter should be brought formally before the judges by those interested—and the interested parties are not merely the town agents, but country practitioners in general; for although agents think it worth while to do a vast deal of work for the niggardly pittance allowed by the present tariff, they occasionally make a charge somewhat in proportion to the labour, time, talents or experience, as the case may be, devoted to the case entrusted to them —which fees, however, very generally come out of the pockets of their country principal. There is no reason why a proper fee should not be allowed to counsel arguing a case before one judge, as well as when the same person argues a no more difficult case before two or three judges. The remarks of Mr. Justice Galt, in the late case of *Royal Canadian Bank*

v. *Matheson* (*ante*, p. 9) are in point here, and have as much general application as they had special application in the case then before him. It may be said that a judge has a right to give a *fiat* for a counsel fee in special cases, but this is seldom asked for and seldom given; and it is unpleasant to ask, and no person should be required to crave as a favor that which he should receive as a matter of right.

The rules as read in court are as follows:—

### REGULÆ GENERALES.

*As to the jurisdiction of the Clerk of the Crown and Pleas of the Court of Queen's Bench.*

Hilary Term, A.D., 1870.

Whereas, by the statute made and passed in the session of the Legislature of Ontario, held in the 33rd year of the reign of Her Majesty, intituled, "An Act respecting proceedings in Judge's Chambers, and Common Law:" it is enacted that it shall and may be lawful for a majority of all the Judges of the said courts, which majority shall include the two Chief Justices, or one of the Chief Justices and the senior of the Puisne Judges of the Superior Courts of Common Law, from time to time, to make and publish general rules for certain purposes therein mentioned:

It is therefore ordered, that the Clerk of the Crown and Pleas of the Court of Queen's Bench be, and is hereby empowered and required to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the rules and practice of the said courts, or any of them respectively, were at the time of the passing of the said Act, and are now done, transacted or exercised by any judge of the said courts sitting at Chambers, except in respect of matters relating to the liberty of the subject, and to prohibitions and injunctions, and except (unless by consent of the parties) in respect of the following proceedings and matters, that is to say:—

All matters relating to criminal proceedings.

The removal of causes from inferior courts other than the removal of judgments for the purpose of having execution.

The referring of causes under the Common Law Procedure Act.

Revising taxation of costs.

Staying proceedings after verdict.

Appeals in insolvency.

In all such excepted matters, not being matters relating to the liberty of the subject, the said Clerk may issue a summons returnable before a judge.

That in case any matter shall appear to the said Clerk of the Crown to be proper for the decision of a judge, the Clerk may refer the same to a judge, and the judge may either dispose of the matter, or refer the same back to the Clerk with such directions as he may think fit.

That appeals from the clerk's order or decision shall be made by summons, such summons to be taken, and within four days' after the decision complained of, or such further time, as may be allowed by a judge or the said clerk.

The appeal to be no stay unless so ordered by a judge or the said Clerk.

The costs of such appeal shall be in the discretion of the judge.

That the scale of costs for all matters done by and before the Clerk, shall be the same as are fixed for business done by and before the judges.

That the same fees shall be taken in respect of business transacted before the said clerk a, Chambers as are now taken when the same business is transacted before a judge.

That these Rules take effect on the 21st day of February, A.D. 1870.

## LAW SOCIETY—HILARY TERM, 1870.

The following is the result of the late examinations, for calls to the bar and admission as attorneys:—

### CALLS TO THE BAR.

A. H. Macdonald and R. Oliver, Guelph; P. Ferguson, Walkerton; John Barry, Hamilton; J. McDougall, Toronto; J. H. Ferguson, London; T. D. Delamere, B. A. Toronto; J. N. Kirchhoffer, Port Hope; A. J. Matheson, Toronto; John Cameron, B.A. London; — Hall, Guelph; F. C. Denison, Toronto; G. Green, and T. G. C. Green, Toronto; and Mr. H. J. Larkin, of the Lower Canada Bar.

### ATTORNEYS ADMITTED.

C. W. Matheson, Simcoe; F. G. A. Henderson, Belleville, and H. E. Nelles, London, equal; Jno. Shaw, Toronto; J. N. Kirchhoffer, Port Hope; T. J. C. Green, Toronto; A. J. Matheson, F. C. Denson, J. McDougall, Toronto; T. G. Fennell, Bradford; F. W. Lally, Barrie; W. H. Nash, London; D. Junor, St. Mary's; Alfred Frost, Owen Sound.

Mr. Macdonald and Mr. Matheson were passed without being required to undergo any oral examination. We understand that the standard of marks for this purpose has been increased this Term from two-thirds to three-fourths.

## OVERHOLDING TENANTS.

We publish in another place a judgment given by Mr. Hughes, Judge of the County Court of Elgin, under the Overholding Tenants Acts, which decides a point of interest.

This decision is at variance with the dictum of Judge Logie, County Judge of Wentworth, in *Nash* v. *Sharp*, 5 C. L. J., N. S., 73, though the latter case went off on another point than that expressly decided in *Re Sutton* v. *Bancroft*, to which we now refer.

A careful reading of the late Act in connection with the former statutes and decisions thereon would seem to shew that the construction placed upon the Act by Judge Hughes is the correct one.

## NEW WORK ON REAL PROPERTY.

We understand that within three months, Mr. Leith will publish an edition of a leading English text book for students, on Real Property, adapted to the laws of Ontario. This will be a valuable addition to the works already given to the profession by the learned author, and will be gladly welcomed.

## SELECTIONS.

## THE JUDICIAL SYSTEM OF FRANCE.

France with a population of 37,000,000, is divided into 86 departments; each department is divided into districts, or, as they are called, arrondissements, of which there are 363, in each of which is a court, known as the Tribunal of First Instance, making 363 of these courts.

Each district is divided into cantons, of which there are 2847, each canton into communes or parishes, of which there are 36,819. In each canton there is a justice of the peace, who decides summarily, without the intervention of attorneys, all matters in contests of small importance, and has jurisdiction in criminal matters where the fine imposed does not exceed fifteen francs ($3), or where the imprisonment is for five days or less. The Tribunal of Justice of the Peace also acts with the consent of parties as a court of concilliation. There are 2847 justices of the peace. They are all salaried officers, and are professional men. The maires of communes also exercise, it would seem, some judicial authority. The appeal from the decision of the Tribunal of the Justice of the Peace, is to the Tribunal of the First Instance of the district.

### Tribunals of First Instance.

The Tribunal of the First Instance is composed of from three to twelve judges, according to the population of the district. If the court has seven or more judges, is divided into two chambers, one of which has charge of criminal and the other of civil matters.

If the court has twelve judges, it is divided into three chambers, two civil and one criminal. The Tribunal of First Instance at Paris being very large it is divided into ten chambers. It has one procureur imperial, or attorney-general, with twenty-two deputies, and one registrar, with forty-two deputies.

The concurrence of *three* judges of a chamber, in this court in civil cases, and of *five* in criminal cases, is necessary for a decision.

One of the judges of this tribunal is appointed to act in the district for three years as a judge of criminal instruction. There is usually one to every criminal chamber, and attached to the Paris Tribunal of First Instance there are eleven. This judge, in conjunction with the procureur imperial (district attorney), examines every case of criminal accusation, and makes his report once a week to the criminal chamber of the Tribunal of First Instance, and that body, which must be composed of at least five judges, decides whether the party accused shall be discharged or not. If they decide that he shall not be discharged, they send the case to the criminal chamber of the Court of Appeal of the jurisdiction for further examination, and if that body think that a crime has been committed, and that it is of sufficient gravity, they send the case to the Court of Assize of the department to be tried by a jury.

The decisions of the Tribunals of First Instance are reviewable in the Court of Appeal of the jurisdiction.

The judges are appointed for life.

### Courts of Appeal.

There are twenty-seven Courts of Appeal in France, now called Imperial Courts, each of which takes its name from the city or place where it is established. Each court is divided into chambers, corresponding usually with the number of departments over which the court has jurisdiction; so that in the twenty-seven courts, there are eighty-six chambers, that being the number of the departments in France.

Each Court of Appeal is composed of at least twenty-four judges, who are called counsellors, and is usually divided into three chambers, one having cognizance of civil cases, one of criminal accusations, and the other of appeals in police matters. In the civil chamber, seven judges must concur in a decision, and in the chamber of accusation, five. There is one general president, and a president for each chamber, who is selected by the judges of that chamber.

The Court of Appeal in Paris has six chambers, a first president, six presidents of chambers and fifty-nine judges.

In important matters, such as questions of state, or very difficult questions, two chambers, where there are more than one, are united and the decision must be concurred in by fourteen judges. This is termed the solemn hearing, and is called by the first president of his own motion or by him, upon the request of one of the chambers, in a matter which they deem of sufficient importance.

The appeal from this court is to the Court of Cassation, and must be brought within three months.

The judges are all appointed for life, but may retire or be retired upon a pension after thirty years' service, or in the event of permanent infirmity.

### Court of Assize.

There is also a Court of Assize, composed of judges of the Court of Appeal in each department (or eighty-six in all), for the trial of criminal cases with a jury. Where the seat of the Court of Appeal is within the department, the Court of Assise of the department is held by three of the judges of the Court of Appeal, the senior judge being president, and when such is not the case the Court of Assize is held by one judge of the Court of Appeal, and two judges of the Tribunal of First Instance of the district where the Court of Assize is held; the judge of the Court of Appeal being president.

The Court of Assize is held every three months, usually at the chief town of the department. The one in Paris is held twice every month. The trial is public; the jury is composed of twelve; they pass only upon the facts, and a verdict by the majority is sufficient. The appeal from the judgment of the Court of Assize is to the Court of Cassation, and must be brought within three days.

### Tribunals of Commerce.

There are in all the commercial towns and cities in France what are known as Tribunals of Commerce. The number or the locality of these courts is not fixed by law, but is determined by the government, according to the exigencies of each locality. This court takes cognizance only of disputes and transactions between merchants, tradesmen, bankers, or of matters connected with trade or commerce, in which is included bankruptcy. It is composed of a president, of judges and of supplemental judges. The number of the judges must not be less than two nor more than fourteen. The number of the supplemental judges is in proportion to the exigency of the public service. The number of each in each tribunal is fixed by a government regulation. The judges of this tribunal serve for two years, without compensation, and are elected by an assembly of the most eminent commercial men within the district, the list of electors being prepared by the prefect of the department, and approved by the minister of the interior. Any commercial man thirty years of age, who has exercised his calling with honor and distinction for five years, may be elected either as a judge or a supplemental judge. The president must be forty years of age, and be chosen from among those who has served as judges. Three judges, at least, must concur in a decision. If the amount involved is under 1500 francs ($300) there is no appeal, nor in any matter, if the parties give their consent to abide by the decision without appeal. In all other cases an appeal lies to the Court of Appeal within the jurisdiction, and takes priority in the court over other appeals.

In the Tribunal of Commerce in Paris, there were in the year 1853, 51,042 cases, of which 35,257 went by default, 10,465 were put at issue, 2663 were concillated, and 1985 were withdrawn. This tribunal has a general president, ten judges and sixteen supplemental judges. It is in session every day throughout the year except Sundays, and is one of the most useful courts in France.

### Court of Prudhommes.

(*A Mechanic's or Workingman's Court.*)

There is in the cities of Paris and Lyons, and in some of the other cities, a court called *The Court of Prudhommes* (literally good and true men, but meaning in this connection men well versed in some art or trade). It takes cognizance of all contests between manufacturers or master workmen, and their workmen and apprentices. It acts first as a court of conciliation, and if that fails, it has jurisdiction to the amount of 200 francs ($40), without appeal, and jurisdiction to any amount subject to appeal to the Tribunal of Commerce, if there is one in the district, and if not to the Tribunal of First Instance.

This Court of Prudhommes consists of a council composed of master-workmen or manufacturers, and of foremen, being six of each, equally balanced; one-half of each of which go out every two years, but are re-eligible. They are elected by the members of their respective classes. To them is added a president, and two vice-presidents, appointed by the sovereign for three years, but who are re-eligible.

This is a very practical and most useful tribunal. It sits every day except Sunday, decides cases with great dispatch, with little expense, and generally to the satisfaction of both parties. They are usually settled by concilliation. There are in the Paris Tribunal about 4000 cases in the year, two-thirds of them relating to wages. The judgments seldom exceed one hundred annually, and appeals are rare.

### Court of Accounts.

The next court is the Court of Accounts. It is a court of exchequer, before which com matters relating to the public expenditures, all fiscal matters, claims against government, the administration of poor-houses, hospitals, public charities, &c. It has a first president, three presidents, eighteen counsellors, or masters of account, and eighty referees, divided into two classes, a registrar and deputies and three chambers, each of which has separate duties. The appeal from this court is to the Council of State.

### Court of Cassation.

The last and highest of the permanent courts of France, is the Court of Cassation. It is composed of fifty judges, called counsellors, and is divided into three chambers, one of request (matters arising upon petition), one civil, and one criminal and police. It has a first president and three presidents of chambers.

It is the final appellate court from all intermediate tribunals of last resort, such as the Courts of Appeal.

An appeal to it must be brought within *three* months after the judgment appealed from was rendered.

It does not, as the Courts of Appeal do, review the merits, but as its name imports, breaks the judgment, if the forms of procedure have been violated, or the judgment is founded upon an erroneous interpretation of the law, and sends the case back for another hearing, usually to a different tribunal, but one of the same rank, as the one that first decided it. The court to which it is sent, is not, as our inferior courts are, bound by the interpretation given to the law by the higher tribunal, but may make the same decision as the former tribunal, if it thinks that the decision of the Court of Cassation was erroneous, though, of course, great deference is paid to the opinion of the higher tribunal. Instances have occurred in which three different courts of appeal rendered the same judgment notwithstanding it had been twice declared by the Court of Cassation to be erroneous. Where such is the case, the question is no longer agitated, but the government (the Corps Legislatif), with the sanction of the emperor, makes a decree declaratory of the law, which is binding thereafter upon all judicial tribunals.

The applicant must deposit 250 francs ($30), which he forfeits to the other party if he fails, and is sentenced in addition to pay 300 francs ($60), to the state.

No chamber of the Court of Cassation can give judgment unless it is composed of seven judges, including the president.

Each chamber appoints its own president, and five members go out of each chamber every six months, but not until they have finished all the matters heard before them. The Civil Chambers sit every week day except during the months of September and October; the Criminal continuously throught the year, and the session is four hours a day.

In great or very important cases, the three chambers are called together by the first president of his own motion or upon the request of one of the chambers. The judges are robed in scarlet upon the occasion, and when they come together it is the most imposing and dignified judicial body in the world.

The judges of the Court of Cassation are appointed for life, and are retired in the same manner as the judges of the Courts of Appeal.

### High Courts of Justice.

The highest court in France is the High Court of Justice, which assembles only when an imperial decree is issued for its convocation for the trial of offences against the life of the sovereign or the safety of the state. It is composed of five judges and five supplementary judges, chosen from the judges of the Court of Cassation, and of a jury of thirty-six chosen from the members of the councils general of the departments. The judges and the jury are appointed annually by the sovereign.

The foregoing is a concise but accurate and full statement of the whole judicial organization of France. It does not however embrace any changes that may have been made during the past ten years, as the writer has not had facilities for ascertaining what laws or decrees have been enacted within that period. It may be added that the civil judicial organization of France is regarded as very perfect, and that the jurists of no country have done more to advance the science of jurisprudence. —C. P. D.—*The American Law Register.*

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## MANSLAUGHTER.

The Coroner's Inquest upon the body of the Welsh fasting girl, as she has been popularly styled, has ended in the committal of her father upon a charge of manslaughter. It is said the Treasury have taken the matter into their own hands, and as the case is pending we shall abstain from discussing its merits. But there can be no harm in indicating the kind of legal questions which must arise in such a case, and they are of rather a curious kind, bearing somewhat upon that most perplexed subject, the legal doctrines of causation.

The parents of the girl, and apparently the girl herself had long publicly maintained that she lived without food. This representation was naturally received with some incredulity, and at last a sort of vigilance committee was formed to watch the case, with a staff of doctors and nurses acting in concert with them. The vigilance party, with the full consent of the girl's father, took her entirely in charge, and kept a rigid watch and ward over her. They were most willing that she should have any amount of food, provided she or her father asked for it, but she should have none on the sly. The father, and it would seem the girl herself as long as she was in a condition to exercise a choice, were determined not to ask for food; though they were quite anxious that food should be had, but only on the sly; and between the two parties the girl died.

It is somewhat as if she had been lying in a room with two doors, a front door and a back. A. locks the back door, but would admit any amount of food by the front. B. bars the front door, but tries his best to smuggle food in by the back. Between them the patient dies. Who killed her, A. who locked the back door, or B. who barred the front? If that were all, it would be difficult to say, that either did so singly. And, therefore, so far, the jury were probably right in acquitting the doctors, nurses, and the rest of any criminal liability. But in the actual case, B., who represents the father, not only barred the front door, but was also a consenting party to the locking of the back, trusting, it would seem, to his own ingenuity to evade the vigilance of his rivals and open the door on the sly. And upon this ground the jury may have been right in their finding against the father.

There is another possible view of the case however. It may be said that both parties combined to carry on a contest of wits, a sort of game of chess, over the girl, which was from the first manifestly likely to result in her death, and which, in fact, it did do. If it be maintainable that those concerned were upon this ground guilty of manslaughter, which we by no means say is the case, then it seems to follow that both parties to the contest are in the same position, and both or neither ought to be indicted.—*The Solicitors' Journal & Reporter.*

## RIGHTS OF THE PROFESSION.

Lawyers have rights for which they pay dearly, but which are sometimes ignored. The persons who pass by the name of agents or "clerks" often do the work that it is the entire privilege of the lawyers to do. We are happy to say that at last something is being done to protect the profession. Elsewhere we publish section 70 of the new Bankruptcy Act, which forbids any persons but barristers and solicitors to practise in the court, and an order of the Worship Street Police Court, forbidding any persons but barristers and solicitors, and, under certain circumstances, articled clerks, from practising. These are steps in the right direction. Will not county court judges lend their aid to this reform? In county courts agents, instead of lawyers, appear, and not only defraud the profession but waste the time of the judge and do injury to their clients. Surely the county court judges might do something to discountenance this practice, if, indeed, they have not the power to put an immediate and entire stop to it.—*The Law Journal.*

# ONTARIO REPORTS

## PRACTICE COURT.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Edwards et al. v. Bennett.

*Ejectment—Defendant retaking possession.*

Under the circumstances set out below a new writ of *hab. fac. pos.* (the first having been executed and returned) was refused. *Wilson* v. *Chanton*, 6 L. T., N. S., 255, followed.

[Practice Court, Michaelmas Term, 1869.]

*Osler*, obtained a rule *nisi* last Term, upon the 19th November, calling upon Henry Bennett and James Erwin, to shew cause why an order should not be made on them to leave or give up possession of the east half of Lot No. 28, in the 2nd Concession of the Township of Woodhouse, and to restore the possession thereof to the plaintiffs, and why a writ of attachment should not issue against them, for having *illegally re-entered on the said lot against the plaintiffs' will*, directly after the Sheriff had ejected them under the process of the court.

The affidavits in support of the motion stated that a judgment for want of appearance had been obtained against the above defendant, Henry Bennett, at the suit of the above plaintiffs, in September, 1868: that thereupon a writ of *hab. fac. pos.* was issued upon the 21st July, 1869: that this writ was fully executed by the sheriff upon the 24th July, 1869, by the sheriff removing Mary Bennett and James Erwin, her son by a former marriage, and his brothers and sisters, Mary Bennett having after the decease of her first husband married the defendant Henry Bennett, who at the time of the commencement of the action of ejectment was not living on the premises; and by his nailing up the door and window and giving possession to one Davis, who resided on the adjoining lot, in the west half of the same lot. The affidavit of Davis which was also filed upon the motion stated that the writ having been executed on Thursday the 24th of July in the above manner, he observed smoke issuing from the chimney of the house on the following Tuesday, and that upon going to the house he found Mary Bennett and her son James Erwin in possession, and he suggested that Mary Bennett only could have got possession by striking off the board which had been nailed across the window. There was no allegation of any forcible taking possession, or any expulsion of Davis from his possession, nor was it stated that he in fact was in visible occupation. It appeared further that the writ had been duly returned by the sheriff as fully executed by him on the said 24th July.

*J. A. Boyd*, shewed cause, and filed affidavits of Mary Bennett and James Erwin, wherein it was sworn that Thomas Erwin, the father of James Erwin and the first husband of Mary Bennett, about twelve years ago died seised in possession of the premises in question, of which he had and retained undisputed possession for seventeen years or thereabouts before his death: that he died intestate, whereupon his estate and seisin in the premises descended to James Erwin and his brothers and sisters, of whom there were several as his heirs at law: that five or six months before the action of ejectment was brought against Henry Bennett, he had deserted Mary Bennett, whom he had married, and had left the premises: that when the action of ejectment was commenced, James Erwin was absent from home and knew nothing of it: that the sheriff who served the writ of ejectment upon Mary Bennett told her that the paper served was of no consequence to her, that it was not intended to disturb her or her children, and that she need give herself no uneasiness about it, and that accordingly she did not. The affidavits further stated that after the eviction by the sheriff, James Erwin, having taken legal advice, and in right of his title as a co-heir of his father, and finding the premises unoccupied and the door of the house unlocked, re-took possession, and took his mother and the rest of the family into the house, claiming title through Thomas Erwin, who, as stated above, died seised thereof.

Gwynne, J.—From the facts shewn it appears that the parties against whom this application is made assert no claim whatever through the defendant in the writ of ejectment, but wholly independent of him, under right of the father of James Erwin, who as it is said died seised in possession of the premises. Neither the rule nor the affidavits filed in support thereof allege any *forcible* taking possession of the premises—or any expulsion of any person in possession, on behalf of the plaintiff, nor any actual interference with or disturbance of the officer of the court in the execution of the writ, which has been returned as fully executed.

I find no case which under these circumstances would at all warrant me in making this rule absolute in the whole or in part.

In *Thompson* v. *Mirehouse*, 2 Dowl. 200, the affidavit upon which the motion, which was for a new writ of *hab. fac. pos.* was made, stated that the sheriff's officer had been turned out of possession of the premises before he could deliver it to the lessor of the plaintiff and that the deponent believed the parties committing the violence were combining with the defendant in order to prevent possession being delivered, but the court held it to be indispensably necessary that the defendant in the ejectment should be connected with the dispossession. In *Pitcher* v. *Roe*, 9 Dowl. 971, which appears to go further than any other case, it was the *defendant* in the ejectment against whom the motion was made and who in the night of the same day that he was dispossessed, re-entered and took *forcible* possesion of the premises. In *Lloyd* v. *Roe*, 2 Dowl. P. C. N. S 407, the motion was for a fresh writ of *hab. fac. pos.*, upon a judgment obtained against the casual ejector, to eject the tenants in possession, and who if the action had been defended, would have been the *defendants*, and who, a few days after they had been ejected under the writ of *hab. fac. pos.* obtained upon the judgment against the casual ejector, came again *and forcibly expelled* the plaintiff's agent, who was in visible occupation and took possession again. In *McDermott* v. *McDermott*, 4 Prac. Rep. 252, a similar rule to the present was discharged, although it was the *defendant* in the ejectment who, about three weeks after he had been dispossessed, returned and re-took possession, the door being locked and nailed up as was done here. But the case of *Wilson* v. *Chanton, et al*, reported in L. T. N. S. 255, and (as *Wilson* v. *Chartier*) in 10 W. R. 546, decided by the full court, appears to me to settle the point, and greater weight must be attributed to this decision being that of the full court, than to any of the cases decided by a single judge in the Bail Court. In that case the sheriff had on the 1st February, 1862, given possession of the premises to the plaintiff under a writ of *hab fac. pos.*, issued upon a judgment obtained against the defendants. The plaintiff so put in possession retained possession until the 7th April following, when, the writ having been returned, two of the *defendants* in the ejectment *forcibly re-took* possession from the plaintiff of two cottages from which they had been evicted. Upon an affidavit of these facts, a motion similar to that which has been made in this case, was made upon the 26th of the same month of April. Wilde, B. says—"After the writ of *habere facias possessionem* was returned, the court as to that suit is *functus officio.*" Pollock, C B. says—"The application is entirely novel, I never recollect a similar one. Put the case of an action of detinue for a chattel, the plaintiff recovers and the article is delivered up to him, but afterwards the defendant again gets possession, the court could not summarily interfere to enforce its re-delivery." And Wilde, B. says—"There has been no interference with the sheriff's officer, and consequently no contempt of court—the writ for delivering possession had been executed, and its execution certified to the court and the whole thing completed; the power of the court was then at an end. If the plaintiff has a right to this rule, I do not see why he should not be able to obtain one at the end of twelve months, or even two years after a defendant may have re-entered into possession." And the rule was refused.

The case before me is even stronger than that, when we see what is contained in the affidavits in reply. According to the plaintiff's own shewing, the writ was fully executed, and returned as executed on the 24th July. There is no allegation of any *forcible* taking of possession or any expulsion of any person in actual occupation for the plaintiffs, and now by the affidavits in reply, it appears that James Erwin who was in no sense a party to the action of ejectment in which the judgment was obtained whereon the writ of *hab. fac pos.* issued, and who has no connection in title whatever with the defendant in that action, but utterly repudiating all such connection and all title having ever been in that defendant, and in his own right as heir of his father, who as he says died seised of the premises, enters in assertion of that title, expelling no body, and takes with him his brothers and sisters, who according to his contention are coheirs with him, and also his mother who has no estate in the premises except as entitled to dower thereout.

The rule must be discharged with costs.

*Rule discharged with costs.*

## COMMON LAW CHAMBERS.

### Regina v. Reiffenstein.

*Extent—Commission to find debts—Affidavit of danger—Felony and civil remedy.*

*Held*, 1. That a debt whereon to found a writ of extent may be found on inquisition without *vivâ voce* testimony.

2. That an affidavit of danger is sufficient if it satisfy the judge to whom the application for a fiat for a writ of extent is made, that there is danger that the debt will be lost if immediate remedy is not granted.

3. That it is not an irregularity, that an inquisition finds that the defendant was a debtor to the crown on the 20th of July, the inquisition being filed and a writ of extent issuing on the 21st July.

4. That the rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded, does not apply where the Crown, and not a private person, is the plaintiff.

[Chambers, December 30th, 1870.]

This was an application to set aside a writ of extent.

On the 17th July last, a commission to find debts against the defendant, a clerk in the office of the Receiver-General, was issued from the Court of Queen's Bench, on a fiat of the Chief Justice of the Common Pleas, founded on an affidavit of John Langton, auditor of public accounts, who stated the fact of the indebtedness; but no *vivâ voce* testimony was taken by the commissioners, who acted on this affidavit alone.

The commission with the finding of the debt by the commissioners and jury thereon endorsed, was returned and filed on the 21st of July, when, on reading the commission, inquisition and affidavit of danger, a writ of extent was by *fiat* of a judge taken out, directed to the sheriff of the county of Carleton.

The affidavit of danger, filed on the application for the *fiat*, was made by Mr. Langton, as follows:—

"That I was the auditor of the public accounts of the late Province of Canada for many years immediately before the establishment of the Dominion: that I have been the auditor of the public accounts of the said Dominion ever since its establishment, and that I have a personal knowledge of the facts hereinafter mentioned and contained:

That one George C. Reiffenstein, was for many years, and up to the establishment of the said Dominion, a clerk in the department of the Receiver-General of the said late Province: that he has been ever since the establishment of the said Dominion up to the twenty-sixth day of June now last past, a clerk in the department of the Receiver-General of the said Dominion, and that a portion of his duties, as such clerk, was the superintendent of the distribution of the municipalities fund of Upper Canada:

That it has been up to this time ascertained on investigation of the accounts of the said George C. Reiffenstein, that he has, during the period he has been so acting as such clerk as aforesaid, from time to time, fraudulently misappropriated divers large sums of money which belonged to the government of the said late Province, and the said Dominion respectively; the whole or considerable portions of which said sums of money he fraudulently converted to his own use; such several sums of money amounting, in the whole, to the sum of twenty-two thousand dollars or thereabouts, and that he, the said George C. Reiffenstein, is now a defaulter and indebted to the government in that amount:

That the said George C. Reiffenstein is at present in custody in the common gaol of the said county of Carleton, in respect of the fraudulent misappropriation aforesaid, and criminial proceedings are now being taken against him therefor:

And lastly, that I am informed and do verily believe, that the said George C. Reiffenstein is possessed of monies and other property within the said county of Carleton; and that it is desirable that an immediate writ of extent should issue on behalf of the Crown to attach such monies and other property; and I verily believe, that unless such writ of extent do issue forthwith there is danger of the said monies and other property being made away with and entirely lost to the government of the said Dominion, and of the claim of the crown for the monies so misappropriated as aforesaid being thus defeated."

The return to the commission to find debts, as well as the writ of extent alleged that the defendant became a debtor of record to the Crown on the 20th July, 1869.

On the 25th November, the writ of extent was returned and filed with the sheriff's return thereto. Mrs. Reiffenstein, wife of the defendant, subsequently appeared and claimed part of the property, real and personal, seized under the extent.

*O'Brien*, on filing verified copies of the papers above referred to, obtained a summons calling on the Attorney-General for the Dominion to shew cause why the said writ of extent herein, and all proceedings had thereunder, should not be set aside on the following grounds:—

1. That the requisition to find debts was taken on the affidavit of John Langton only, the said John Langton not being present upon said inquisition, nor any evidence of any witness being taken *vivâ voce*.

2. That the writ issued without any affidavit of insolvency or other affidavit sufficient to shew grounds according to the practice.

3. That the writ of extent misstated the day that the defendant became a debtor of record, the inquisition to find debts not having been returned and filed until 21st July, whereas the writ states him to have been a debtor of record on the 20th July.

4. That the affidavits on which the said writ issued charged that a felony was committed, so that no writ could issue to find debts, or debts be found or enforced which were the subject of the felony, until the prosecution of the defendant to conviction for the felony; or why all proceedings herein should not be stayed until the fifth day of next term &c.

*R A. Harrison*, Q.C., shewed cause, and took the following preliminary objections:—

That the original writ was not before the court, and on this ground alone the application must be discharged. It would not suffice to put in a copy, as the defendant had done in this instance: *Manning's* Exch. Prac. 114; *King* v. *Mallett*, 1 Price 395.

The application is too late. A motion to set aside a proceeding for irregularity must be made promptly. The extent was issued on the 22nd of July, and this summons was taken out on the 29th of December. In the meantime Georgina Reiffenstein had appeared to the writ, and claimed the property, and had asked time to plead, and the defendant had been represented on the trial of the claims of Mrs. Reiffenstein, and he must be barred by such delay and waiver: *Manning's* Exch. Prac. 114.

The motion should have been to set aside the *fiat* of the judge on which the extent issued. So long as the *fiat* stood, the writ must stand: *Rex* v. *Rippon*, 8 Price 38.

As to the grounds taken in the summons he contended:—

1. That even if evidence by affidavit be insufficient, that is no ground to set aside the *extent*. By the practice an affidavit is sufficient to find the debt: *West* on Extents 22; and *Reg.* v. *Ryle*, 9 M. & W. 227, is a direct authority in its favor.

2. The affidavit of danger was sufficient in the opinion of the judge who granted the *fiat*, and that is all that is necessary, and this *fiat* is not moved against. But the affidavit is sufficient according to the practice: *Man.* Ex. Prac. 11, 262.

3. If the date is not properly stated, the defendant may plead to that effect. But it is sufficient to say that there was a debt at the time of the investigation.

4. The reason for the rule on which this objection is founded does not apply where the Crown is concerned, and in any case it is no reason for setting aside the proceedings.

*J. H. Cameron*, Q.C (*O'Brien* with him), supported the summons.

As to the preliminary objections: The case in *Price* proves nothing, as apparently there was not even a copy of the writ before the court. The objections go to the ground-work of the writ, and the motion is therefore not too late. It is not necessary to move against the *fiat* as that stands, and if this writ is set aside a new extent can issue on the same *fiat*.

As to the grounds in the summons:—

1. The alleged practice is objectionable and should not be followed, and the cases authorising it should be reviewed by the full court, and both in *Manning* and *West* the practice is remarked upon as one which "no lapse of time can legalise."

2. Not only must insolvency be shewn, but also the facts which establish it must be set out: *West* on Extents 51; *Man.* Exch. Prac. 12.

3. The mistake of the day appears on the face of the writ, and there is a manifest false statement on record; and this may be of great importance to third parties whose rights may be interfered with by such error. The inquisition only shews that the defendant had lands when he was *not* a debtor to the Crown.

4. The prosecution for the felony should be concluded before the civil action is gone on with, and the same rule should apply in Crown as in other cases.

It was also urged that if there was any doubt on the points taken it would be proper to let the matter stand till Term, especially as all the defendant's property was under seizure.

Galt, J.—I shall speak of each point as it appears on the summons. The grounds are:—

1st. That the inquisition to find debts was taken on affidavit without any witness being examined *viva voce*.

A similar objection was taken in the case of *The Queen* v. *Ryle*, 9 M. & W. 227, and expressly over ruled by the Court of Exchequer.

2nd. That the writ issued without any affidavit of insolvency or other affidavit sufficient to shew grounds according to the practice. Mr. West, in his Treatise on the Law of Extents, page 47, states: "The need for the immediate extent is shewn to the court by the affidavit that the debtor is insolvent, which is called an affidavit of danger; and the court (or single Baron) shews the exercise of its (or his) discretion as to the expediency of issuing the immediate extent by granting the *fiat*." The *fiat* in this case was granted by the learned Chief Justice of the Common Pleas, on an affidavit which satisfied him that this was a case in which an immediate extent should issue, and I should certainly never think of interfering with the exercise of his discretion, but would, if I entertained any doubt, postpone the case for the consideration of the court. I must say, however, that had the application been made to me I would, without hesitation, have given the *fiat*. As far as I can understand the law as laid down in Mr. West's Treatise, all that is necessary is to satisfy the court or judge that there is danger that the debt will be lost if immediate remedy be not granted; and whether the danger arises from insolvency, (which is the usual ground) or from any other cause which satisfies the court that such danger really exists, is immaterial. I do not specify the particular reasons assigned in the affidavit in this case, but they would have been quite sufficient to have induced me to grant the *fiat*.

3rd. That the writ of extent misstates the day that the defendant became a debtor of record. The inquisition to find debts not having been returned and filed until 21st July, whereas the writ states him to have been a debtor of record on the 20th of July. The inquisition was dated on 17th July, 1869, and appears to have been taken on the 20th. There is a memorandum endorsed on the copy before me to the effect that it was filed on 21st. There is no formal statement of any kind as to when it was received and filed. I cannot see in what manner the defendant can be prejudiced by this mistake (if it is a mistake, for no authority was cited by the learned counsel), and if, in truth, any of the property extended was acquired by him between the finding of the inquisition on the 20th and the filing of it on the 21st he might shew it, I presume, so as, *quoad* that property, to claim that it was not found by the inquisition or liable to the *extent*. In the absence of any such allegation I see no reason for setting aside the extent.

4th. That the affidavits on which the said writ issued charged that a felony was committed, so that no writ could issue to find debts, or debts be found or enforced which were the subject of the felony, until the prosecution of the defendant to conviction for the felony. This objection appears to me to be founded on a misapprehension of the law as applied to private persons; the reason of the rule which prevails between private persons, that until the ends of justice have been satisfied by the prosecution of a person charged with felony no action can be maintained for a private wrong, can have no application to a case in which Her Majesty is a party.

I therefore think that this summons should be discharged.

*Summons discharged.*

## COUNTY COURT CASE.

### In the matter of Sutton, Landlord, v. Bancroft, Tenant.

*Overholding Tenants Act—Assignee of reversion.*

Under the Overholding Tenants Act, 31 Vic. cap. 26., the word "landlord" includes the assignee of the reversion.

[Hughes, Co. J., St. Thomas.]

The facts of the case were, that one Burtch demised the premises to this tenant for a term which had expired, but before the end of the term conveyed the reversion to Sutton, who claimed the possession as landlord.

*Ellis*, as attorney for the tenant, denied the relation of landlord and tenant within the meaning of the Act, upon which alone the County Judge has jurisdiction. Proof of title and of the lease having been made from Burtch to Bancroft, and no attornment shewn from Bancroft to Sutton, Mr. Ellis claimed to have the proceedings quashed and the application discharged for want of privity between the parties, and that the fact of his being in possession did not constitute Bancroft Sutton's tenant; nor did the assignment of the reversion constitute Sutton Bancroft's landlord. The notice to quit and demand of possession were admitted.

*McDougall*, counsel for the landlord, cited the 18th section of the Act as to the meanings of the words "tenant" and "landlord," whereby they have assigned to them interpretations which heir ordinary signification do not import, and referred to *Nash* v. *Sharp*, 5 C. L. J., N. S., 78, as good authority under the former statute, but not under the Ontario Act, for by the interpretation of the 18th section no room whatever is left for doubt.

Hughes, Co. J.—In the Act, 4 Wm. IV. cap. 1, I find an interpretation clause (sec. 59), but no such meanings attached to the words "landlord" and "tenant" as are assigned them by the 18th section of the Ontario Act, nor do I find them in the Con. Stat. of U. C. cap. 27. The Act 27 & 28 Vic. cap. 30, affords a more expeditious remedy for cases coming within the meaning of the previously existing statute, but I find no extension as to the kind of cases which might be reached by that remedy, so that up to the passing of the Ontario Statute, 31 Vic. cap. 26, any decision of the Superior Courts as to the extent of the remedy and the class of cases coming within the purview of the then existing statutes would apply and be authoritative. Not so, however, since the passing of the statute now in question, because the word "tenant" is thereby declared to mean and include an occupant, a sub-tenant, under-tenant (if there be any difference between "sub" and "under") and his and their assigns and legal representatives; and the word "landlord" is declared to mean and include the lessor, owner, the party giving or permitting the occupation of the premises in question, and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives. I think that *Bonser* v. *Boice*, 9 U. C. L. J. 213, does not apply as an authority in this case, for the statute in question affords not only a more expeditious but a more extensive remedy than was ever devised or contemplated by any previously existing statute, and no room is left for a well founded doubt that the word landlord includes the assignee of the reversion. The foregoing decision is at variance with the decision of his honor judge Logan, in *Nash* v. *Sharp*, above referred to. The latter case went off on another point than that expressly decided in the above case. Our views of the late statute agrees with the judgment of the county judge of Elgin.

I therefore decide, 1st. That this is a case clearly coming within the meaning of the second section of the Act. 2nd. That the tenant, Bancroft, holds without color of right, and was tenant, &c., for a term which has expired, and wrongfully refuses to go out of possession thereof, &c.

*Writ of possession ordered.*

## ENGLISH REPORTS.

## QUEEN'S BENCH.

### Fair v. The London and North-Western Railway Company.

*Damages—Future prospect—Negligence—Railway company.*

Where a plaintiff having been injured through the negligence of the defendant can show that, although only enjoying at present a small income, he has a reasonable prospect of increasing that income, such prospect ought to be a matter of consideration for the jury.

[Q. B. 18 W. R., 66.]

This was an action tried before the Lord Chief Baron at Hartford, and was brought to recover damages for injuries received in an accident on the defendants' railway; a verdict was found for the plaintiff, damages £5,000, with £250 for expenses.

The plaintiff was a clergyman of twenty seven years of age, enjoying an income of £250, as a secretary to the Irish Mission, and it was shewn at the trial that he was a young man of great promise, and had reasonable expectations that he should increase his income hereafter.

It was admitted that he was totally incapacitated by the accident for the present, and that any improvement in his condition was a matter of great doubt.

*Vernon Harcourt*, Q C., now moved for a new trial, or to reduce damages on the ground that they were excessive. £5.000 is an exorbitant sum when calculating on £250. Such a sum would produce a larger annuity. How can the prospect of a man be proved? By calling friends on one side to give favorable evidence, and witnesses on the other to disparage? There should be some limit as in America, otherwise railway companies are made insurers at full amount without any means of ascertaining the value of what is insured. There should be some power to protect themselves by special contract, as there is in the case of horses, goods, &c.; cannot the principle in *Hadley* v. *Baxendale*, 2 W. R. 802, 9 Ex. 341 be applied here?

**Cockburn, C.J.**—Certainly not. The argument of Mr. Harcourt calls on us to take upon ourselves the functions of the Legislature and to establish a new principle. True it is that to do full justice in some cases damages are so great as to cause serious inconvenience, but that is no reason for altering a principle. If a railway undertakes to carry a passenger, and is guilty of negligence, the passenger is entitled to bring an action, and in considering the case juries are to take into account two things: first, pecuniary loss in profession or business; secondly, injury to the person or health; for pecuniary loss the jury should consider not merely the amount of income but also the reasonable probability of acquiring larger income in future. It would be monstrous if when a man has reached a certain stage in his career, yet judging from the past you can see with reasonable certainty that he will increase his income, you should exclude such considerations from the jury. You would exclude a most important element and inflict the gravest injustice. The jury are bound to take into account not only income, but the destruction and annihilation of health and prospects. Here is a man at the outset of life, of great promise, with his prospects ruined and his health destroyed. I consider £5,000 within reasonable limits.

**Mellor, Lush, Hannen, J.J.**, concurred.

*Rule refused.*

## CHANCERY.

### Pickard v. Hine.

*Practice—Appeal by married woman without next friend*

A married woman having been made a party to a suit in respect of her separate estate, appealed without the intervention of a next friend. Appeal directed to stand over for a next friend to be appointed, appellant's solicitors to give an undertaking to pay the costs of the day; in default appeal to be dismissed with costs.

[L. C., 18 W. R. 75.]

This was an appeal by two defendants from a decision of Vice-Chancellor Stuart.

One of the appellants had become bankrupt since the decree, and the other, a married woman, who had been made a defendant to the suit in respect of her separate estate, had appealed without the intervention of a next friend.

*Dickinson*, Q. C., and *Willis*, for the respondents, took a preliminary objection to the prosecution of the appeal by the married woman without a next friend. They cited *Elliot* v. *Ince*, 5 W. R. 465, 482, 7 De G. M. & G. 475.

*Schomberg*, Q. C., and *Bush*, for the appellants.—This case is not governed by *Elliot* v. *Ince*. Here the married woman has been made a defendant with respect to her separate estate. She is to some extent considered a *feme sole*, and this is an answer to the objection.

Lord **Hatherley**, C., after observing that unless some case was made he could not go on without a next friend, directed the hearing of the appeal to stand over, with leave to amend the petition of appeal by adding a next friend, amendment to be made and undertaking by appellants' solicitors to pay the costs of the day, to be given within a week; otherwise the appeal to be dismissed with costs.

### Pearce v. Morris.

*Mortgage—Acceptance of tender by mortgagee—Reconveyance.*

A mortgagee on accepting a tender of his principal, interest, and costs from the owner of a part of the equity of redemption, is bound to convey the mortgaged estate, and to hand over the title-deeds to the person making the tender, and will not by so doing incur any liability to the other owners of the equity of redemption. If, however, the mortgagee accept a tender from a mere stranger to the estate, he is not bound to convey or give up the title-deeds to such stranger.

[L. C. 18 W. R. 196.]

This was an appeal from a decision of the Master of the Rolls.

The plaintiff had contracted with the mortgagor for the purchase of a portion of certain lands of which the defendant was mortgagee.

The plaintiff then requested the defendant to convey the legal estate to him, and to hand over the title-deeds, but this the defendant refused to do, on the ground that he held the legal estate upon trust for the owners of the equity of redemption. The plaintiff thereupon filed his bill, praying that the plaintiff might be declared entitled to have the mortgaged premises transferred to him, and the title-deeds delivered up to him, and that the defendant might be ordered to transfer the premises and deliver up the deeds accordingly.

The portion of the premises which the plaintiff had contracted to purchase was conveyed to him after the bill was filed, and this fact was proved by affidavit.

The Master of the Rolls made a decree for conveyance and for the delivering up of the deeds to the plaintiff, the form of conveyance to be settled in chambers, and from this decree the defendant appealed.

The case is reported in the court below (17 W. R. 1001, L. R. 8 Eq. 217), where the facts are more fully stated.

*Jessel*, Q.C., and *Nalder*, for the appellant, the defendant.—The plaintiff had a mere contract, which might at any time have gone off and left him a mere stranger to the estate. But if he were entitled to the equity of redemption of a portion of the mortgaged premises he would have no right to a conveyance. We were compelled, at the risk of losing our interest, to accept the tender, but having notice of conflicting claims, we were bound not to convey until we had proof of who the real owners of the equity of redemption were, otherwise we might have been held liable for a breach of trust. This was not a contract to transfer, but to redeem. They cited *Cholmondeley* v. *Clinton*, 2 J. & W. 184; *James* v. *Biow*, 3 Swanst. 234; *Wicks* v. *Scrivens*, 1 J. & H. 215; *Henley* v. *Stone*, 3 Beav. 355; *Colyer* v. *Colyer*, 11 W. R. 587.

*Southgate*, Q.C., and *Villiers*, for the plaintiff.—The plaintiff became owner of the charge by paying off the defendant, who accepted our tender, and is, therefore, estopped from denying our right to redemption and conveyance. If this were otherwise, we might have great difficulty in getting contribution from the other owners of the equity of redemption. As to the form of the decree, Lord Romilly said he would settle the conveyance in chambers; but even i the legal estate were conveyed to us without limitation, it would be absurd to contend that the other owners of the equity of redemption could be prejudiced: *Elisha* v. *Elisha*, Seton, on Decrees, 465, 475; *Titley* v. *Davies*, 2 Y. & C. C. C. 399; *Smith* v. *Green*, 1 Collyer, 555.

*Jessel*, Q C., in reply.

Lord Hatherley, L.C.—The question to be decided relates to the position of the mortgagor and mortgagee when several are interested in the equity of redemption, and the authorities have clearly settled the proper course to be pursued under these circumstances. Any person interested in the equity of redemption is entitled to redeem, and when he tenders the mortgage money and interest, to have a conveyance of the legal estate and the title deeds delivered up to him. The form of the conveyance must depend on the circumstances; but the case in Seton, p. 475, shows how that is dealt with.

In *Wicks* v. *Scrivens*, I had to decide the case of a tenant for life, and I decided then that he was entitled to redemption and to a conveyance. My opinion is, therefore, that it is not necessary for a mortgagee to wait for the institution of a chancery suit where there happen to be different claimants to the equity of redemption, and that it would be very mischievous to hold that the mortgagee is bound to enquire as to who are the real owners of the equity of redemption, he is only bound to ascertain that the person tendering payment has an interest in it. The mortgagee is only a trustee, and to this extent—he is not entitled to convey to a mere stranger to the estate; but as long as there is any interest in the person tendering, he has discharged his duty by giving a conveyance to such person, and handing him over his title deeds.

As to the form of the conveyance, it is desirable that the deed on the face of it show that others are interested in the equity of redemption and that should be stated on the decree.

As to the costs I confess I have felt much difficulty. The mortgagee being told that the plaintiff was owner of a portion of the estate by contract was put in this position:—If he refused the tender he might lose his subsequent interest, and if he conveyed the legal estate, he might be conveying to one who might turn out not to be the owner. The person contracting may have a right to make a tender; but whether he has a right to a conveyance and the deeds, until the conveyance to him by his vendor is perfected, is another matter. In my opinion this bill was prematurely filed.

*James* v. *Biow* was cited to show that a mortgagee was not bound to make a conveyance, unless he had a clear account of all those interested in the equity of redemption: but all that case decides is, that he must ascertain that the person tendering is not a mere stranger. I think in this case the defendant was entitled to reasonable proof that the plaintiff was not a mere stranger. I am satisfied by the affidavit that the plaintiff's title is now complete, but this was not the case when the bill was filed. The Court will not force a mortgagee to convey and hand over deeds until the title is perfected, although he accepts the tender.

The decree will be that the plaintiff now being ti tled to a portion of the estate, and having d emed, he is entitled to have a conveyance and delivery of the deeds. The simple rule is, that a person who makes out his title to some portion of the estate, and redeems the mortgage, has a right to the conveyance and the deeds. The defendant's case was, it is true, put much too high; still, considering that the plaintiff was not in a position to assert an immediate right, I cannot lay too much stress on that. There was no threat to part with the deeds or create an adverse title. In my opinion the decision as to costs was erroneous. The decree must be varied, and after the direction to convey the legal estate must be inserted "subject, as to those portions of the premises in which the equity of redemption is vested in persons other than the plaintiff, to such right and equity of redemption." The plaintiff must pay the costs. There will be no costs of the appeal.

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## Gilliatt v. Gilliatt.

*Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48)—Employment of puffer—Reserved bidding.*

Land was offered for sale by auction, subject to a reserved price, but a right to bid was not reserved.

*Held*, that the employment of a person to bid on the seller's behalf was illegal, and vitiated the sale.

[M. R. 18 W. R. 203.]

This was an adjourned summons. The facts were, that under the decree in this cause an estate in Sussex was offered for sale by auction by Messrs. Norton, Trist, Watney & Co., the eminent auctioneers, subject to conditions of sale, the second of which was: "The sale is subject to a reserved bidding, which has been fixed by the judge to whose court this cause is attached."

No right to bid was reserved on behalf of the owners.

The estate was knocked down to a purchaser for £29,000, which was the reserved price. The purchaser afterwards discovered that a puffer had been employed by the auctioneer, and accordingly took out the present summons to set aside the sale.

It was in evidence that one puffer had been employed who bid for himself, and made in all four biddings, but did not bid beyond £28,900.

The Sale of Land by Auction Act (1867), sec. 5, provides that the conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved. If it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.

*Jessel*, Q C., and *Whitehorne*, in support of the summons.

*Sir R. Baggalloy*, Q.C , and *Langworthy*, for the owners, submitted that the employment of a puffer under the circumstances of the case was immaterial, inasmuch as he did not bid up to the reserved price.

*Mortimer* v. *Bell*, 14 W. R. 68, L. R. 1 Ch. 10, was referred to.

Lord Romilly, M.R —The meaning of the Act is clear, that in every case of a sale of land by auction, the owner must state in the conditions of sale whether there is a reserved price, and if he also mean to employ a puffer he must say that a right to bid is reserved. This has not been done in the present case; the purchaser must therefore be discharged, and the deposit returned with interest at four per cent.

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### Parker v. Simpson.

*Res judicata—Staying proceedings—Practice.*

The dismissal of a bill by consent, as well as adversely, is a bar to a second suit for the same object, and the defendant may avail himself of this defence by a motion to stay proceedings, or *(semble)* by a motion to take the bill off the file.

If a plaintiff's consent to an order effecting a compromise has been obtained by fraud, his proper course is to move to have the order annulled before the judge who made it.

[V. C. M. 18 W. R. 204.]

The plaintiff in this cause, who was a person with no pecuniary means, had filed a bill in the Rolls Court on the 1st of April, 1869. He then compromised the claim put forward by that bill, and agreed to release his demands against the defendants to it, on their paying his creditors three and fourpence in the pound. The payment was made, and the plaintiff thereupon applied for and obtained the dismissal of his bill, with costs as against some of the defendants, and without costs as against the others, in accordance with the terms of the agreement. It was stated in court that the plaintiff considered that his consent to this compromise was unfairly obtained.

Shortly afterwards the plaintiff filed the present bill, which was a verbatim copy of his former bill, with the single exception that it mentioned the death of one of the former defendants and substituted his personal representatives in his place.

*Cotton, Q C.*, now moved, on behalf of the defendants, to stay all further proceedings in the suit.

*Pearson, Q. C.*, appeared for the plaintiff.

Malins, V.C., after hearing the facts, asked if they were admitted, and then said that the point was too clear for argument. A decree deciding against a claim was a bar to the institution of another suit raising the same claim; and the dismissal of a bill by consent had the same effect as an adverse decree. If the plaintiff contended that his consent to the order dismissing his bill had been obtained by fraud, his proper course would be to move to dissolve it before the same judge who had made it. To bring another suit for the same matter in a different branch of the court was a most improper proceeding. He would make the order prayed for, and would also, if desired, take the bill off the file.

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United States Legal Tender Act;—*Held, per* Chase, C. J., that the Legal Tender Act, passed February, 1862, is inoperative as to all contracts for the payment of money made prior to that date, and such contracts can only be discharged by the payment of gold or silver coin. —*Hepburn et al.* v. *Griswold.*

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## UNITED STATES REPORTS.

## SUPREME JUDICIAL COURT OF MAINE.

### Geo. W. Prentiss v. Elisha W. Shaw et al.

The plaintiff was unlawfully seized by the defendants, carried thence three miles and confined in a room several hours, and thence to a town meeting, where he took an oath to support the Constitution of the United States, and was discharged. In the trial of an action of trespass, based upon these facts, the plaintiff claimed (1.) Actual damages resulting from his seizure and detention; (2.) Damages for the indignity thereby suffered; (3.) Punitive damages. *Held:—*

1. That the plaintiff was entitled to recover full pecuniary indemnity for the actual corporeal injury received, and for the actual damages directly resulting therefrom, such as loss of time, expense of cure, and the like:
2. That the declarations of the plaintiff, made prior to the unlawful arrest and tending to provoke the same, not being a legal justification thereof, are inadmissible in mitigation of the actual damages; but,
3. That such declaration made on the same day, and communicated to the defendants prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest, indicative of the motives, provocations, and conduct of both parties, are admissable upon the question of damages claimed upon the other two grounds.

The writ was dated June 15th 1867, and contained a declaration in trespass, substantially alleging that Elisha W. Shaw (a deputy sheriff), Putnam Wilson, Jr., Oliver B. Rowe, Hollis J. Rowe, and Daniel Dudley, on the 15th April 1865, at Newport, with force and arms, assaulted, beat, and bruised the plaintiff, thereby permanently injuring his hip and back, violently forcing him into and locking him in a room in the Shaw House, subjecting him to remain there five hours, violently taking him from thence into a carriage and carrying him against his will to the town-house in Newport.

The plaintiff introduced evidence tending to show that in April 1865, while he was at a blacksmith's shop in Newport, where he was having his horses shod, Shaw, Dudley, Wilson, and H. J. Rowe seized him, and forcibly putting him into a waggon, transported him a prisoner three miles distant, to Newport village, and confined him for several hours in a room in the hotel there; that a crowd of men accompanied the four defendants to the shop and from thence to Newport village; that the four defendants inflicted injuries upon the person of the plaintiff; and that threats of extreme personal injuries were made to the plaintiff, both at the blacksmith shop and at Newport village, by some persons.

There was conflicting testimony as to the extent of the injuries to the plaintiff's person

The defendants, against the objections of the plaintiff, introduced evidence tending to show that the four defendants seized the plaintiff in the forenoon of the day on which the news of the assassination of President Lincoln was received; that when the plaintiff stepped into the blacksmith shop, he said, addressing one Gilman (who was a witness in this case): "He that draweth the sword shall perish by the sword, and their joy shall be turned into mourning;" that Gilman (alluding to the assassination of the President) said to the plaintiff; "I suppose there are some who are glad of it," that the plaintiff thereupon replied: "Yes; I am glad of it; and there are fifty more in town who would say so if they dared to;" that Gilman rejoined that the plaintiff would be glad to take those words back; that the plaintiff responded substantially that he would not; and that Gilman thereupon informed the plaintiff that he should report him.

On cross-examination, Gilman testified that he thought that the plaintiff, when speaking of the assassination, said it might stop the further effusion of blood.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that the blacksmith shop was three miles from Newport village, where three of the defendants were; that Gilman, in about twenty minutes after his conversation with the plaintiff, told it to the defendant Wilson; that Gilman and Wilson went to Newport village and informed the four defendants of the plaintiff's declarations concerning the assassination; that, about two hours afterwards, the four defendants proceeded to the blacksmith shop and did the act proved by the plaintiff; that there was great excitement in the public mind upon the receipt of the news of the assassination.

The plaintiff reasonably objected to the admission of the alleged declarations of the plaintiff, made to Gilman that day: but the presiding judge ruled that the plaintiff's declarations made that day, concerning the assassination of the President, might be given in evidence *de bene esse*, it having been stated by the defendants' counsel that they should prove the same had been communicated to the defendants before their arrest of the plaintiff.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that, after the confinement of the plaintiff in the hotel, he was taken by them, on the same day, to a public meeting of the citizens, called at the town-house, at which a moderator and a clerk were chosen, and acted officially; that, at the meeting, a vote was passed that the plaintiff be discharged upon his taking an oath to support the Constitution of the United States; and that the plaintiff voluntarily took such oath and was thereupon discharged.

The defendants also introduced evidence tending to show, that, before arresting the plaintiff, telegraphic communication, relative to the plaintiff's declarations concerning the assassination, was had with the provost-marshal at Bangor, who replied by telegraph, that he should be arrested and held; that thereupon the defendant Shaw, then an acting deputy sheriff, with three other defendants, acting under his orders, proceeded to make the arrest; and that they honestly believed that they had a legal right to do what they did, and had no malice towards the plaintiff.

As to the four defendants proved to have been present (and the other, if found to have participated), the presiding judge instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty; that the only question for the jury was the amount of damages; that the plaintiff claims damages on three grounds:—

1. For the actual injury to his person and for his detention;

2 For the injury to his feelings, the indignity, and the public exposure; and,

3. For punitive or exemplary damages.

That they were bound to give, at all events, damages to the full extent for the injuries to the plaintiff's person and for his detention.

That, as to damages for the second and third grounds, it was for the jury to determine, on the whole evidence, whether any should be allowed, and the amount.

The presiding judge explained to the jury the nature and grounds of such damage, and instructed them, *inter alia*, that they could only consider the evidence introduced by the defendants under the second and third heads above set forth, and in mitigation of any damages they might find under either or both of said heads, if, in their judgment, those facts did mitigate such damages; but that they could not consider them under the first head.

The jury acquitted O. B. Rowe, and found a verdict of guilty against the other defendants, and assessed damages in the sum of $6.46. Whereupon the plaintiff alleged exceptions.

*W. H. McCrillis*, for the plaintiff, contended, *inter alia*, that the language of the plaintiff was not a sufficient provocation. It was not personal to any of the defendants: *Corning* v. *Corning*, 2 Selden 97; *Ellsworth* v. *Thompson*, 18 Wend. 658.

Sufficient provocation cannot be proved in mitigation when the assault and battery were deliberately committed. The assault must accompany the provocation before the blood has time to cool. The question is, was there time for a reasonable man to reflect, and not whether the defendants continued in a state of passion: *Cope* v. *Sullivan*, 8 Selden 400; *Avery* v. *Ray*, 1 Mass. 11; *Lee* v. *Woolsey*, 19 Johns. 319; *Willis* v. *Forrest*, 2 Duer 318.

Words cannot constitute justification. Words can never be sufficient provocation. They may provoke extreme anger, and the anger be admitted in mitigation. But, if the blood has time to cool, the assault is regarded as deliberately done and cannot be mitigated. Any other rule would be subversive of the order of society.

*L. Barker*, for the defendants.

(*To be continued.*)

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE AND JULY, 1869.

(*Concluded from Vol. V. page 27.*)

**Ignorance**—*See* **Bond.**

**Illegal Contract.**

Property pledged to the keeper of a brothel to secure payment for wine, &c., consumed in a debauch in said brothel, cannot be recovered by the pledgor of the pledgee.—*Taylor* v. *Chester*, L. R. 4 Q. B. 309.

**Implied Grant or Reservation**—*See* **Easement; Way.**

**Indemnity, Act of**—*See* **Conflict of Laws.**

**Indictment**—*See* **Assault.**

**Injunction.**

The publication of any document which

would destroy property, whether consisting of money or reputation, may be restrained in equity.

An injunction was granted against the publication of a notice stating that a merchant was a partner in a bankrupt firm.—*Dixon* v. *Holden*, L. R. 7 Eq. 488.

*See* Bond; Fraudulent Conveyance, 3; Interpleader; Light; Nuisance, 1, 2.

Insanity—*See* Domicile.

Insurance.

1. Meat shipped at Hamburgh for London was delayed on the voyage by tempestuous weather, and solely by reason of such delay became putrid, and was necessarily thrown overboard at sea. *Held*, not a loss by perils of the sea, or within the words "all other perils, losses, and misfortunes," &c., in a policy of insurance on said meat.—*Taylor* v. *Dunbar*, L. R. 4 C. P. 206.

2. An assurance company lent W. £1000 on a mortgage for that sum and on a policy on his life for the same amount, which he effected with them for the purpose. The policy contained a condition, that if W. should die by his own hands, &c., it should be void, "except to the extent of any *bona fide* interest therein which, at the time of such death, should be vested in any other person . . . for a sufficient pecuniary or other consideration." W. committed suicide while insane, the policy being still in the hands of the company. *Held*, that the company came within the above exception to the condition, and that the policy was valid to the extent of the debt to them. The mortgage was ordered to be re-assigned — *White* v. *British Empire Mutual Life Assurance Co.*, L. R. 7 Eq. 394.

Interest—*See* Bank.

Interpleader.

The plaintiff's affidavit of no collusion in an interpleader suit cannot be rebutted before the hearing by a counter affidavit, although the plaintiff has filed additional affidavits in reply. In such a case, an order was made for the payment of the money into court and for an injunction, on the plaintiff's giving an undertaking as to damages. Order of Malins, V.C., reversed.—*Manby* v. *Robinson*, L R. 4 Ch. 347.

Invitation—*See* Negligence.

Joint Tenancy—*See* Legacy, 3.

Jurisdiction—*See* Account; Court.

Laches—*See* Cheque; Mortgage, 4.

Landlord and Tenant.

1. B. made a second mortgage of certain premises to the defendants by an indenture which was executed by B. but not by the defendants, who, however, advanced money on it. B. by the deed conveyed the premises in fee, on trust for sale; "and as a further security for the principal and interest for the time being due from B., . . . B. did thereby attorn and become tenant to the defendants, their heirs, &c., for and during the term of ten years, if that security should so long continue," at a certain rent payable on each 1st of October. "Provided that . . . without any notice or demand . . . it should be lawful for the defendants, their heirs, &c., before or after the execution of the trusts of sale," to enter on the premises, eject B., and determine the said term of ten years. B. accordingly continued in occupation, and, rent not being paid on the first rent day, the defendants distrained. It appeared by the deed that the defendants had only an equity of redemption. *Held*, that the intention of the parties, as shown by the deed, and that the effect of the Statute of Frauds on the same, was to create a tenancy at will, and that B. became tenant at will on attornment; also that B. was estopped by the deed to deny that the defendants had a legal reversion, although the truth appeared. (Exch. Ch.)—*Morton* v. *Woods*, L. R. 4 Q B. 293; s. c. L. R. 3 Q. B. 658; 3 Am. Law Rev. 703.

2. Defendant entered upon, occupied, and paid rent for premises under a demise for a term of years, made on behalf of a corporation, the owners, but not sealed with the corporate seal. By this agreement, defendant undertook to make certain repairs. *Held*, that he was bound by his stipulation. He had become tenant from year to year on the terms of the demise applicable to such a tenancy.—*Ecclesiastical Commissioners* v. *Merral*, L. R. 4 Exch. 162.

*See* Covenant, 1.

Lapsed Devise—*See* Executor and Administrator, 4.

Law of Nations—*See* Rebellion.

Lease—*See* Covenant, 1; Landlord and Tenant; Mortgage, 3; Vendor and Purchaser of Real Estate.

Legacy.

1. Bequest to testator's son L. for life, and after his decease equally between and amongst the wife of L. (in case she should survive him) and all and every the child and children of L., as they should severally attain twenty-one, at which period the shares of such children were to be vested in them. At the date of the will, L. had a wife and one child, but the wife died before the testator. After the testator's death,

L. married again, and died leaving a widow. *Held*, that L.'s widow took under the will.—*In re Lyne's Trust*, L. R. 8 Eq. 65.

2. Bequest to A. B. for life, and after her death to eight, equally, their interests to be vested from the death of the testator; and in case of the death of any of the eight before the tenant for life, the share of those so dying to be paid to the survivors equally. The eight legatees survived the testator, but all died before the tenant for life. *Held*, that the survivorship was to be referred to the death of the tenant for life, and that, as none survived that moment, each took his original gift.—*Marriott* v. *Abell*, L. R. 7 Eq. 478.

3. A bequest to testator's wife and executrix absolutely, "for the benefit of herself and children," creates a joint tenancy among the children which is not severed by the marriage of a daughter. *Semble*, the wife takes a life estate. *Armstrong* v *Armstrong*, L. R. 7 Eq. 518.

*See* CHARITY. 1, 2; DEVISE, 1; FORFEITURE; PERPETUITY; WILL, 7–14.

LEGISLATURE—*See* PARLIAMENT.

LIBEL.

1. At a meeting of a board of guardians, at which reporters were present, a member, E., said "he hoped the local press would take notice of this (the plaintiff's) very scandalous case," and requested the chairman, P., to give an outline of it. P. did so, and said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." There was other language to the same effect. A correct but condensed summary of the proceedings, containing remarks defamatory of the plaintiff, which were made at the meeting, was afterwards published in two local newspapers. *Held* (Exch. Ch. *per* KEATING, MONTAGUE SMITH, & HANNEN, JJ., BYLES & MELLOR, JJ., *dissentientibus*), that there was evidence to go to the jury of publication of the libel in the newspapers by E. and P.—*Parkes* v. *Prescott*, L. R. 4 Exch. 169.

2. A report of the directors of a company contained the following statement: "The shareholders will observe that there is a charge of £1306 for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." This report was printed and sent to the shareholders, according to the usual practice, by order of a general meeting. *Held*, that, in the absence of evidence of express malice, the printing and publication of the report was privileged.—*Lawless* v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q B. 262.

3. The defendant, in a privileged communication, described the plaintiff's conduct as "most disgraceful and dishonest." The conduct so described was equivocal, and might honestly have been supposed by the defendant to be as he described it. *Held*, that the above words were not of themselves evidence of actual malice. (Exch. Ch.)—*Spill* v. *Maule*, L. R. 4 Exch. 232.

*See* INJUNCTION.

LICENSE—*See* NEGLIGENCE.

LIEN—*See* COLLISION, 3; FRAUDULENT CONVEYANCE, 2.

LIGHT.

Plaintiff pulled down a building with ancient lights, and put up a new one with larger windows only partially coinciding with the old ones. There were also additional windows. The owner of the servient estate obstructed the light of the substituted windows. An injunction was refused.—*Heath* v. *Bucknall*, L. R. 8 Eq. 1.

LUNATIC—*See* DOMICILE.

MALICE—*See* LIBEL, 2, 3.

MARRIAGE SETTLEMENT—*See* DEED; FRAUDULENT CONVEYANCE; SEPARATION DEED; WARD OF COURT; WIFE'S EQUITY.

MARRIED WOMAN—*See* HUSBAND AND WIFE.

MARSHALLING OF ASSETS.

Land was mortgaged to secure £1500. By a later deed, the same and other land, and some personalty, were mortgaged to secure the old and a new debt. The mortgagor died intestate. In a case between the administrator and heir-at law: *Held*, that the first mortgaged land was first liable for the £1500. The new debt to be apportioned between the realty and personalty.—*Lipscomb* v. *Lipscomb*, L R. 7 Eq 501.

*See* BANKRUPTCY, 4, 5; CHARITY, 1; DEVISE, 2; PARTITION.

MASTER AND SERVANT—*See* CONTRACT.

MISDEMEANOR—*See* ASSAULT.

MISTAKE—*See* AWARD; BOND.

MONEY HAD AND RECEIVED—*See* AWARD, 2.

MORTGAGE.

1. A creditor agreed to remit part of the debt, on the debtor's giving him a mortgage for the balance. A mortgage was afterwards given with a power of sale, but also with a proviso, that, if the mortgage debt should not be paid within two years, or if any other condition should be broken, the whole of the original debt should be recovered. It also recited that the agreement had been made without

prejudice to the creditor's original rights. *Held*, that the proviso was not a penalty against which equity would relieve. Judgment of CHELMSFORD, L.C., reversed.—*Thompson* v. *Hudson*, L. R. 4 H. L. 1; s. c. 2 Eq. 612; 2 Ch. 256; 1 Am. Law Rev. 518, 690.

2. A mortgage secured £600, future advances, interest on both, and all costs of any suits under the provisions of the deed or in anywise connected therewith; the total moneys secured not to exceed £1200. On a bill to redeem, a decree was made by STUART, V.C., directing an account of what was due the mortgagee for principal and interest under the deed, and of sale-moneys, rents, and profits received by him. The mortgagee appealed. *Held*, that the decree was right. (*Per* SELWYN, L.J.) Because costs properly incurred in actions relating to the property might be claimed under it as "just allowances." (*Per* GIFFARD, L.J.) Because they might be claimed as principal due under the deed.—*Blackford* v. *Davis*, L. R. 4 Ch. 304.

3. B. mortgaged a term to D. for £3000. D. submortgaged the term, less three days, and the debt, to E., with power to sue for the whole of the same, to secure £1200. B. died, and E. claimed £3000 from B.'s estate. B.'s administrators assigned the equity of redemption to D. D. by registered deed assigned all his estate to trustees for the benefit of creditors. E. foreclosed a second submortgagee, and D., whose trustees disclaimed by answer. E. then ceased paying rent, which he had been doing, and B.'s lessors entered. *Held*, that the disclaimer only extended to what was in issue in the suit, and did not enlarge E.'s estate, and that E. could prove against B.'s estate for £3000, but was not to receive more than £1200, interest and costs.—*In re Burrell*, L. R. 7 Eq. 399.

4. A. and B., mortgagees, transferred their mortgage to W., who gave no notice of the transfer to T., the mortgagor. T., intending to redeem, paid the amount secured by the mortgage to the solicitors of A. and B., who were also W.'s solicitors, without ascertaining that they were authorized to receive it. The solicitors misappropriated the money, and prepared a deed which A. and B. signed, being deceived as to its contents, which contained a recital acknowledging the receipt of the money, and which purported to convey the property to the mortgagor's nominee. No receipt was indorsed on the deed. *Held*, that W. was entitled to foreclose.—*Withington* v. *Tate*, L. R. 4 Ch. 288.

*See* BANKRUPTCY, 6; INSURANCE, 2; MARSHALLING OF ASSETS; PLEDGE.

NAVIGABLE WATER—*See* NUISANCE, 1; STATUTE, 3.

NEGLIGENCE.

It was the practice of consignees of coal by defendants' road to go along a flagged path by the side of the road at the station, and to assist in the unloading, which was done by tipping the coal into cells. The plaintiff was consignee of a coal wagon which could not be unloaded in the usual way, as all the coal cells were full. He told the station master that he must have some coals, and, no reply being made, he went to the wagon, took some coal from the top, and descended to the flagged path. The flag he stepped on was worn and gave way, and he fell and was injured. *Held*, that defendants were liable, although the plaintiff was not getting his coal in the usual manner.—*Holmes* v. *North-Eastern Railway Co.*, L. R. 4 Ex. 254.

*See* COLLISION, 2; LACHES; PROXIMATE CAUSE.

NEGOTIABLE INSTRUMENT—*See* BOND.

NOTARY—*See* EVIDENCE, 3.

NOTICE—*See* COMPANY, 3; EXECUTOR AND ADMINISTRATOR, 3; MORTGAGE, 4; WAY.

NUISANCE.

1. The plaintiff, a riparian proprietor on a tidal navigable river, filed an information and bill to restrain the opposite riparian owner from building a jetty in the *alveus* of the river. It was not proved that the plaintiff's land would be seriously injured by a greater volume of water being thrown upon it. But the public navigation and that of the plaintiff would be interfered with. *Held*, that the suit was properly framed, and an injunction was granted with costs. *Semble*, the Attorney-General need not have been joined.—*Attorney-General* v. *Earl of Lonsdale*, L. R. 7 Eq. 377.

2. A tenant from year to year obtained an injunction from MALINS, V.C., against the erection of a circus, which was to last only a short time, on the ground that it would draw together a crowd of disorderly persons. Defendant appealed, the land having meanwhile been covered with permanent buildings. *Held*, that there was not sufficient ground for an injunction, and this having been granted, the appeal was not only for costs.

But an injunction against a circus, the noise of which was so loud as to be distinctly heard in the plaintiff's house when the windows and shutters were closed, was upheld, without a trial by jury. Since *Sir John Rolt's Act*, 25 & 26 Vict. c. 42, this is not necessary if the evidence satisfies the court.—*Inchbald* v. *Robinson*. *Inchbald* v. *Barrington*, L. R. 4 Ch 388.

3. A., while lessee of two print-works, erected a weir across the stream which supplied them, and diverted the water from one of them at a point where he was riparian owner, but where defendants, who had no interest in the water, were owners of the bed of the stream. The plaintiff becoming lessee of the last mentioned print-work, and entitled to the water of the stream, removed the weir, which was soon replaced against the will of the defendants. Defendants declined to remove the weir, but gave plaintiff full liberty to do so. *Held*, that defendants were not liable for the continuance of the nuisance.—*Saxby* v. *Manchester, Sheffield, & L. Railway Co.*, L. R. 4 C. P. 198.

Oyer and Terminer—*See* Court.

Parliament.

A statute rendering ineligible for Parliament any one who shall "undertake, execute, hold, or enjoy" any contract for the public service, does not disqualify one who has performed his part of such contract before his election, although he has not been paid.—*Royse* v. *Birley*, L. R. 4 C. P. 296.

Parties—*See* Bankruptcy, 2; Nuisance, 1.

Partition.

A. and B., tenants in common in fee, made an agreement for partition, but both died before the deed was executed. A., the survivor, devised the share agreed to be held in severalty by him, but allowed the legal estate in one moiety of B.'s share to descend to his heir-at-law. *Held*, that the costs of partition, including those of getting in the legal estate, must be borne by the devisees of A., and not by his personal estate.—*In re Tunn*, L. R. 7 Eq. 434.

Partnership.

1. Money received by one member of a firm of solicitors, in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; and the firm are liable for any loss from the dishonesty of the partner by whom the money was received. *Earl of Dundonald* v. *Masterman*, L. R. 7 Eq. 504.

2. A. and B. were partners under an oral agreement to share profits and losses equally. A. died, having advanced to the firm £1900 more than B. The net assets of the partnership were only £1400. *Held*, that the deficiency of £500 was a loss to be borne equally by A. and B.—*Nowell* v. *Nowell*, L. R. 7 Eq. 538.

*See* Bankruptcy, 2; Discovery, 2.

Pawn—*See* Bankruptcy, 4, 5; Damages; Illegal Contract; Pledge.

Payment—*See* Cheque; Executor and Administrator, 3; Mortgage, 4.

Payment into Court—*See* Interpleader.

Penalty—*See* Mortgage, 1.

Perpetuity.

A fund was bequeathed, after the death of an unborn legatee for life, to all the children of A. (who was alive at the date of the will, share and share alike), and to the children of such of the said children "as shall be then dead, according to the statute of distributions; . . . but in case there shall be no child or grandchild of the said A. then living," then over. *Held*, that this was not a gift to the children of A., vesting at their birth, but to persons to be ascertained at the death of the unborn legatee for life, and therefore void as too remote. *Avern* v. *Lloyd*, L. R. 5 Eq. 383 (3 Am. Law Rev. 100), commented on.—*Stuart* v. *Cockerell*, L. R. 7 Eq. 363.

Pilot—*See* Collision, 2; Error; Will, 6.

Pleading—*See* Collision, 1.

Pledge.

Plaintiff borrowed money of defendants on the security of stock which he transferred to them. Plaintiff repaid the loan in due time, and defendants, who had sold the plaintiff's stock, transferred a like amount of the same stock to him. After a decree by Malins, V.C. (L. R. 6 Eq. 165; 3 Am. Law Rev. 277, 278), charging defendants with the amount for which they had sold the plaintiff's stock, and that he should retransfer that which he had received from them, it appeared that before filing his amended bill plaintiff had sold the stock which he received, a fact not disclosed in said bill. He then filed a petition for leave to transfer a like amount of said stock to defendants, and it was so ordered. *Held*, on appeal, that the order was inconsistent with the decree; and the bill also was dismissed with costs, as not having stated the real facts, but without prejudice.—*Langton* v. *Waite*, L. R. 4 Ch. 402.

*See* Bankruptcy, 4, 5; Damages; Illegal Contract.

Power.

D. made an agreement, not under seal, with a railway company, by which it was recited that D. was owner of lands specified in the schedule which were required by the company, and that the compensation to be paid D. for taking the same had not been ascertained, and it was agreed to abide by the award of arbitrators. Lands owned by D. in fee, and others settled to such uses as D. should by deed appoint, and subject thereto to D. in tail, were included in the schedule without distinction as to the character of D.'s interest in them, and a lump sum was awarded for the whole. D. died before conveying. *Held*, that the agreement was not made by D. as tenant in tail, but was in equity an execution of his power, and that the purchase money was payable to the personal representative of D. as part of his personal estate.—*In re Dyke's Estate*, L R. 7 Eq. 337.

*See* FORFEITURE; FRAUDULENT CONVEYANCE, 3; TRUST, 3.

PRACTICE—*See* COLLISION, 2; ERROR; WILL, 6.

PRESUMPTION—*See* DEATH.

PRINCIPAL AND AGENT—*See* ACCOUNT; CHEQUE; COLLISION, 2; COMPANY, 4; LIBEL, 1; MORTGAGE, 4; REBELLION.

PRINCIPAL AND SURETY—*See* BANKRUPTCY, 6.

PRIVILEGED COMMUNICATION—*See* LIBEL, 2, 3.

PRODUCTION OF DOCUMENTS.

A defendant, being in contempt for not having made an affidavit of documents and otherwise, applied for an order that plaintiff should make such an affidavit. The documents being necessary for the defence, the order was granted, the plaintiff's affidavit and production to be after affidavit and production by defendant.—*Haldane* v. *Eckford*, L. R. 7 Eq. 425.

PROMISSORY NOTE—*See* BILLS AND NOTES.

PROXIMATE CAUSE.

By an act of Parliament, a cut was to be built, and also a culvert under it, which was always to be kept open. In consequence of the negligent construction of the cut by the defendants, the waters of a neighboring river flowed into it, burst the western bank, and flooded the adjoining land. The plaintiff, owning land east of the cut, closed the culvert to prevent his land being flooded; but the owners on the west, believing that this would be injurious to their lands, reopened it, and the plaintiff's land was flooded in consequence. *Held*, that defendants were liable for the entire damage so caused to plaintiff's land, whether the reopening of the culvert was right or wrong. *Collins* v. *Middle Level Commissioners*, L. R. 4 C. P. 279.

*See* VENDOR AND PURCHASER OF REAL ESTATE.

RAILWAY—*See* CARRIER; NEGLIGENCE; STATUTE, 1.

RATIFICATION—*See* BANK.

REBELLION.

The title of the United States to public property of the Confederacy, which was not wrongfully taken from the United States, is a title by succession, and not paramount. Therefore the United States connot demand an account from a Confederate agent in England in respect of his dealings in the Confederate loan, except on the same footing as if taken between the Confederate government and said agent.—*United States of America* v. *McRae*, L. R. 8 Eq. 69.

RENT—*See* APPORTIONMENT, 1; VENDOR'S LIEN.

RES ADJUDICATA—*See* CHARITY, 3.

REVIVOR.

A suit for administration was instituted in the name of three infants by their next friend. One of them, a female, married before decree. She and her husband did not know of the suit, and the next friend and other parties did not know of the marriage until after decree. STUART, V.C., thought a supplemental bill necessary, but the defendants consenting, an order of revivor was made by the Lords Justices.—*Griffin* v. *Morgan*, L. R. 4 Ch. 351

REVOCATION OF WILL.

1. A testatrix destroyed a will without stating at the time her intention in doing so. Subsequently on the same day she said that she had destroyed the will with the intention that a former will should take effect, and she had before expressed the same intention. Probate of a draft of the destroyed will, on motion, was refused.—*Goods of Weston*, L. R. 1 P. & D. 633.

2. A testator, by what he called a codicil to his will, revoked all bequests and dispositions in the will, and nominated executors, but did not in terms revoke the appointment of executors and guardians in the will. *Held*, that the will was not revoked.—*Goods of Howard*, L. R. 1 P. & D. 636.

3. A testator appointed A. and B. his executors. By a subsequent will, containing no clause of revocation, he appointed A. and C. his "sole executors." Probate was granted of both papers, as containing together the testator's last will, to A. and C. The word "sole" revoked the earlier appointment.—*Goods of Baily*, L. R. 1 P. & D. 628.

SALE.

1. J. orally contracted to sell S. two pockets of X. hops on the spot, and two of Y. hops in a warehouse at L., at certain prices per cwt. The X. hops were delivered, the Y. hops were sold by sample. Afterwards, the keeper of said warehouse, by J.'s directions, marked two of three pockets of Y. hops, which J. had there, "To wait orders," with the name of S., but made no transfer in his books, and still held the hops at J.'s charge and risk. Later,

J. sent to S. an invoice, giving the numbers, weight, and prices of the X. hops and of the marked pockets of Y. hops, and a draft for acceptance. S. refused to accept the draft or to receive the Y. hops. *Held*, that the property in the Y. hops had not passed. S. had neither authorized nor subsequently assented to the appropriation of the Y. hops to him by J.—*Jenner* v. *Smith*, L. R. 4 C. P. 270.

2. Stock-jobbers agreed on the Stock Exchange to buy 100 shares for a certain day, and on the sale-note were the words "with registration guaranteed." The jobbers, before the day, gave the name of a transferee, who duly paid the purchase money. The seller executed and delivered the deed of transfer to the transferee, but the latter never registered it, and calls were made upon the seller, who filed a bill against the jobbers for indemnity, and afterwards died. *Held*, that the jobbers were liable to indemnify the seller's estate.—*Cruse* v. *Paine*, L. R. 4 Ch. 441; s. c. L. R. 6 Eq. 641; 3 Am. Law Rev. 714, 715.

3. Stock-jobbers agreed on the Stock Exchange to buy ten shares, and on the name-day gave the name of G. as ultimate buyer, to whom the shares were transferred without objection. It was afterwards discovered that said shares were delivered to the brokers named on the name-ticket as G.'s brokers, as part of a large number bought for S., as undisclosed principal (the dealings not being for specific shares), and that, by arrangement between S. and G., the name of G., who was irresponsible, was given. G.'s brokers and the jobbers were ignorant of this arrangement. *Held* (*Per* Kelly, C.B., and Bramwell & Pigott, BB., Cleasby, B., *dissentiente*), that G. was an ultimate purchaser within the usage of the Stock Exchange, and that the jobbers were not liable for calls.—*Maxted* v. *Paine*, L. R. 4 Ex. 203.

*See* Collision, 3; Copyright; Vendor and Purchaser of Real Estate.

Salvage.

In a case in which the Judicial Committee, being assisted by the Nautical Assessors of the Court, were of opinion that too large a sum had been allowed by the court below as salvage, the vessel assisted not having been in imminent peril of destruction, the sum awarded was reduced by more than one-half.—*The Chetah*, L. R. 2 P. C. 205. See *The England*, *ib.* 253. But see *The Alice* and *The Princess Alice*, *ib.* 245.

Seaman—*See* Contract.

Separation Deed.

By a deed which recited that B. and his wife had agreed to live apart from each other during the remainder of their lives "upon the terms and conditions hereinafter contained," B. covenanted with trustees to allow his wife to live separate, and settled a sum of money upon trust for his wife for her life, and for their children after her death, with a proviso that if B. and his wife should afterwards agree, by writing, &c., to cohabit together, the income of said sum should be paid to B. during such cohabitation, and the trustees covenanted to indemnify B. against his wife's acts and engagements. No separation took place between B. and his wife. *Held*, that the deed was a separation deed, and not a voluntary settlement, and that, as no separation took place, it was wholly void.—*Bindley* v. *Mulloney*, L. R. 7 Eq. 343.

*See* Desertion, 1.

Servant—*See* Contract.

Settlement—*See* Deed; Fraudulent Conveyance, 1, 2; Separation Deed; Ward of Court; Wife's Equity.

Shifting Use—*See* Forfeiture; Perpetuity.

Ship—*See* Collision; Contract; Insurance, 1; Salvage.

Slander—*See* Libel.

Solicitor—*See* Attorney; Mortgage, 4; Partnership, 1.

Statute.

1. The occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw dock, as public rights, and not as easements attached to the premises, and was obstructed in the enjoyment of these rights by the works of the Thames embankment. *Held*, that there was no such "interest in land, injuriously affected," as to entitle him to compensation under the Lands Clauses Act.—*McQueen* v. *Metropolitan Board of Works*, L. R. 4 Q. B. 358.

2. St. 10 Vict. c. 14, s. 13, imposes a penalty on certain persons who shall expose for sale certain articles, except in their own dwelling place or shop. A. was tenant of a dwelling-house and shop, and of ground in front of the same. A wooden shed had been attached to the house for eighteen years, and was partially supported on flags projecting three feet from the house and part of the original building, and in this shed A. exposed said articles for sale. *Held*, that the shed was part of the house, and that A. was not liable (Mellor, J., *dissentiente*).—*Ashworth* v. *Heyworth*, L. R. 4 Q. B. 316.

3. Stones shot overboard from boats below high-water mark, and there remaining until shipped for exportation, are not "landed" within the meaning of an act making all goods landed within a harbor subject to toll (CHANNELL, B., *dubitante.*)—*Harvey* v. *Mayor and Corp. of Lyme Regis*, L R. 4 Ex. 260.

*See* APPORTIONMENT; BANKRUPTCY; CARRIER, 1, 2; COPYRIGHT; COURT; PARLIAMENT; VENDOR'S LIEN.

STATUTE OF FRAUDS—*See* LANDLORD AND TENANT, 1.

STOCK EXCHANGE—*See* SALE, 2, 3.

SUBROGATION—*See* BANKRUPTCY, 4, 5.

SUBTERRANEAN WATERS—*See* EASEMENT.

SUCCESSION DUTY.

An apparent heir died within the time allowed for accepting or rejecting the succession, without having made up a title, received rent, or done any thing to incur representation. *Held*, that there had been no devolution of a "beneficial interest" to said heir which was liable to succession duty.—*The Lord Advocate* v. *Stevenson*, L. R. 1 H. L. Sc. 411.

SUPPLEMENTAL BILL—*See* REVIVOR.

SUPPORT—*See* EASEMENT.

TENANCY FROM YEAR TO YEAR—*See* NUISANCE, 2.

TENANCY IN COMMON.

One tenant in common cannot maintain trespass against another for taking, in the ordinary course, the whole profits of the land.—*Jacobs* v. *Seward*, L. R. 4 C. P. 328.

TENANT FOR LIFE AND REMAINDER-MAN—*See* APPORTIONMENT.

TRESPASS—*See* CONFLICT OF LAWS; TENANCY IN COMMON.

TRUST.

1. A person executed a deed which appointed him trustee, and which declared his acceptance of the office. *Held*, that a claim against him for misapplication of the trust funds was not matter of specialty.—*Holland* v. *Holland*, L. R. 4 Ch. 449.

2. Trustees having power to invest money in the purchase of lands or hereditaments in fee simple in possession, may invest in the purchase of freehold ground rents.—*In re Peyton's Settlement Trusts*, L. R. 7 Eq. 463.

3. Under a power to vary investments, a loan upon a stock-mortgage is not justifiable.

A trustee lent trust funds upon mortgages which were probably not within his authority to take. He made no charge to the trust estate, but received a fee as solicitor from the mortgagor, and derived some other profit, in the way of professional employment, from his investment. *Held*, that the *cestuis que trust* were not entitled to these profits as profits of the trust fund.—*Whitney* v. *Smith*, L. R. 4 Ch 513.

4. Trustees, with the assent of C., the *cestui que trust*, lent trust-money to S. on the security of furniture with a power of sale and on a mortgage of a lease made to S. by A., one of the trustees, in his private capacity. There were covenants to repair both in the mortgage and lease, the former of which contained a power of sale, the latter a power of re-entry on breach of any of the covenants. S. failed to pay interest for some time with knowledge of *cestui que trust* [did not make proper repairs?], and let the rent fall in arrears. A. re-entered, and subsequently assigned his interest in the premises to F., to whom he also sold the furniture. *Held*, that A. by re-entering as landlord and determining S.'s lease, instead of selling it with the furniture as mortgage, had mixed the trust funds with his own, and was liable for the whole sum lent, with interest.—*Cook* v. *Addison*, L. R. 7 Eq. 466.

*See* ACCOUNT; APPORTIONMENT, 1; EQUITY PLEADING AND PRACTICE; EXECUTOR AND ADMINISTRATOR, 3; WARD OF COURT; WIFE'S EQUITY; WILL, 12.

ULTRA VIRES—*See* COMPANY, 3.

USAGE—*See* SALE, 2, 3.

VENDOR AND PURCHASER OF REAL ESTATE.

Defendant, assuming to have authority from the landlord, for whom he had acted in other matters, agreed to renew a lease to the plaintiff, the tenant in possession. Plaintiff afterwards, without communicating with the defendant, agreed to sell to B. her interest in the present and renewed leases. At the end of the old term the landlord put out B., whom the plaintiff had let into possession. Plaintiff then brought a bill for specific performance against the landlord, B. joining with her on being indemnified against the expenses of the suit. The landlord answered and the defendant testified that the latter had acted without authority, and the bill was dismissed. It did not appear that plaintiff had known this fact before. B. then sued plaintiff for her breach of contract, and she paid the amount recovered. *Held*, that plaintiff could recover the costs of the chancery suit and the value of the lease she had lost, but not the damages and costs recovered from her by B.—*Spedding* v. *Nevell*, L. R. 4 C. P. 212.

VENDOR'S LIEN.

An agreement for a sale of land to a company in consideration of a rent charge (under the *Lands Clauses Act*) does not give the vendor a lien for unpaid arrears.—*Earl of Jersey* v. *Briton Ferry Floating Dock Co.*, L. R. 7 Eq. 409.

Voluntary Conveyance—*See* Bond; Fraudulent Conveyance; Separation Deed.

Ward of Court.

A ward of court, entitled to a small fund in court to her separate use, married on the day after she came of age. The Master of the Rolls ordered the fund to be settled; but on appeal it was ordered to be transferred to her after a separate examination.—*White* v. *Herrick*, L. R. 4 Ch. 345.

Warranty—*See* Carrier, 8.

Watercourse—*See* Easement; Nuisance, 1, 8.

Way.

A. purchased of B. the lease of a house, part of an estate agreed to be let to B. upon building leases. There was an arch under the house, described as a "gateway" in a plan drawn on the lease, through which, by the building agreement, was the only access to a mews behind the house. At the time of A.'s purchase there were other means of access to the mews, and a right of way through the arch was not reserved. After the buildings were completed according to the agreement, A. stopped the arch. *Held*, that a right of way through the arch was reserved by implication; that A. had constructive if not actual notice of the building plan, and that, having stood by while it was carried out, A. could not now dispute B.'s rights.—*Davies* v. *Sear*, L. R. 7 Eq. 427.

Wife's Equity.

In making a settlement, to which the wife of a bankrupt had an equity, out of fund: *Held*, (1) that the power of investment was to be confined to those securities on which cash under the control of the Court might be invested; (2) that a power of advancement to children was proper; (3) the limitations in default of appointment to be to children, so that sons who died under twenty-one and daughters who died under twenty-one and unmarried, should not take interests transmissible to their representatives; (4) the ultimate limitation should be to the bankrupt's assignee.—*Spirett* v. *Willows*, L. R. 4 Ch. 407; s. c. L. R. 1 Ch. 520; 1 Am. Law Rev. 512.

Will.

1. The burden of proof that the testator knew and approved of the contents of a will is on the party propounding it.—*Cleare* v. *Cleare*, L. R. 1 P. & D. 655.

2. A will was to this effect: "The instructions given this" day to W.'s "clerk, I desire to be carried out." The instructions were oral, but the clerk had at the time made short notes of them in the testator's presence. There was no evidence the testator knew any thing of said notes further than that he saw the clerk writing. Probate of the notes, on motion, was refused.—*Goods of Pascall*, L. R. 1 P. & D. 606.

3. On the back of a will was found a memorandum in the testator's handwriting, signed by him and witnessed. The witnesses could not remember whether the paper was signed when they attested it, and the testator did not say what the paper was. Probate of the paper as a codicil, on motion, was refused.—*Goods of Swinford*, L. R. 1 P. & D. 630.

4. The testator having informed the witnesses that he wished to make his will, filled up a printed form in their presence and wrote his name in the attestation clause thereto. The witnesses then signed, and the testator again wrote his name after theirs. Probate of the will was granted, omitting the second signature.—*Goods of Casmore*, L. R. 1 P. & D. 653.

5. When a will signed by two witnesses is also signed by a legatee, who is, however, proved not to have signed as a witness, the latter signature will be omitted in the probate. *Goods of Sharman*, L. R. 1 P. & D. 661.

6. A probate may be amended after it has issued, so as to show the true date on which the will was executed.—*Goods of Allchino*, L. R. 1 P. & D. 664.

7. A testator, after life-estates, gave a residue "to my nephews and nieces, the children of . . . L. in equal shares . . . as tenants in common; . . . and in case of the death of any of my said nephews and nieces leaving issue, . . . such issue shall take the share that . . . their deceased parent would have taken if living." *Held*, that the children of nephews and nieces who died before the date of the will, or after that date, but before the testator, took under the will.—*In re Potter's Trust*, L. R. 8 Eq. 52.

8. A testator gave his estate to such of his three grandchildren, S., M., and E., as should survive their father and attain twenty-five; but in case two of them should die under twenty-five, and the amount to which the surviving grandchild would then become entitled should exceed £10,000, then the excess to go to the person or persons, exclusive of the surviving grandchild, who, under the Statute of Distributions, would immediately after the decease of the survivor of the other two

grandchildren be entitled to the testator's personal estate, if he had then died intestate. S., and after her E., died under twenty-five. At E.'s death, M. was the testator's sole next of kin. *Held*, that the persons who at the death of E. would have been the next of kin of the testator if M. also had then been dead, were entitled to file a bill for the administration of his estate, although of a remoter class than M.—*White* v. *Springett*, L. R. 4 Ch. 300.

9. A testatrix gave property in trust as to one-fourth for A. for life and then to A.'s children at twenty-three. Any child attaining twenty-three in the lifetime of A. was to acquire a vested interest. In case of the death of A. without leaving children as aforesaid, the trustees were to pay, apply, and dispose of the income of A.'s fourth to and amongst testatrix's "surviving" daughters, such "benefit of survivorship" to extend to the "surviving" as well as to the original shares. The principal to go to the children of such daughters. The other three-fourths upon like trusts for the testatrix's other three daughters, B., C., and D., and their children. If all the daughters died and none of their children reached twenty-three, the fund was to be held for the next of kin. A. died, leaving children who reached twenty-three. Then C. died childless. Later, D. died, leaving children who reached twenty-three. *Held*, that "surviving" was to be read "other," and the children of A. took part of C.'s share as well as the children of D —*Badger* v. *Gregory*, L. R. 8 Eq. 78.

10. Trust to pay one-fourth of the income each to testator's four sisters for life, and so soon as any of them should die "without leaving issue," the share of those "so dying without issue" to be divisible among the surviving sisters "and the issue of any who may then be dead, in equal . . . shares, but such issue to take only their respective parent's share." And so soon as any of said sisters should die and "leave issue," then to call in the shares of them so dying "leaving issue, and pay the same unto such respective issue, if more than one child, equally." One of said sisters died, having had two children, one of whom survived her mother, and the other died in her mother's lifetime, after the testator, leaving a family. *Held*, that a moiety of the deceased sister's share went to the family of her deceased child.

"Leaving issue" meant "having had children."—*Bryden* v. *Willett*, L. R. 7 Eq. 472.

11. A testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not at his decease consist in money or be invested in any of the public funds or government securities, and to invest the same in such public funds or government securities as to them should seem most advantageous, and to pay the interest, dividends, and annual proceeds of such residue in equal shares to his children for their lives, and after their deaths upon other trusts. *Held*, that the tenants for life were entitled to enjoy *in specie* long annuities of which the testator died possessed.—*Wilday* v. *Sandys*, L. R. 7 Eq. 455.

12. C. left his property to G. by will, and appointed him his executor. When about to die, C. sent for G. and told him privately of his will; G. said, "Is that right?" C. answered, "It shall be no other way." C. also told G. that he would find the will in a certain place and a letter with it. G. testified that nothing further passed between him and C. The letter named many persons to whom C. wished various sums to be paid, but after phrases implying some discretion to be allowed to G., there was this sentence: "I do not wish you to act strictly according to the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would if living, and as the parties are deserving, and as it is not my wish that you should say any thing about this document there cannot be any fault found with you by any of the parties should you not act in strict accordance with it." G. paid money to some of the persons mentioned in the letter, but not to all. *Held*, that the letter did not impose any trust on G.—*McCormick* v. *Grogan*, L. R. 4 H. L. 82.

13. A testator "devised and bequeathed all his other property whatsoever and wheresoever" to trustees, without words of limitation, after a specific devise of lands with such words. He had no other lands at the date of his will, and the terms of the trust, except the word "income," were not appropriate to realty. He afterwards became entitled to real estate of great value. *Held*, that the latter passed to the trustees by the will.—*Lloyd* v. *Lloyd*, L. R. 7 Eq. 458.

14. A testator made a will in favor of his sister only, giving her "all my house and land and book debts," &c., "every thing on the said premises," "and all other chattels." *Held*, that the last words carried the general residue.—*Goods of Sharman*, L. R. 1 P. & D. 661.

*See* Apportionment, 2; Charity, 1, 2; Devise; Election; Executor and Administrator, 1, 4; Forfeiture; Legacy; Partition; Perpetuity; Revocation of Will.

Winding up—*See* Company, 1.

Witness—*See* Will, 5.

Words.

"*All other Chattels*"—*See* Will, 14.

"*Beneficial Interest*"—*See* Succession Duty.

"*Dwelling Place or Shop*"—*See* Statute, 2.

"*For the time being entitled*"—*See* Deed, 1.

"*Interest in land injuriously affected*"—*See* Statute, 1.

"*Issue,*" "*Leaving Issue*"—*See* Will, 10.

"*Landed*"—*See* Statute, 3.

"*Lands or hereditaments in fee simple in possession*"—*See* Trust, 2.

"*No hope at present of recovery*"—*See* Evidence, 2.

"*Perils of the Sea,*" *&c.*—*See* Insurance, 1.

"*Personal Luggage*"—*See* Carrier, 2.

"*Profits in Hand*"—*See* Company, 2.

"*Public funds or government securities*"—*See* Will, 11.

"*Sole Executors*"—*See* Revocation of Will, 8.

"*Spirituous Liquors*"—*See* Covenant, 2.

"*Surviving*"—*See* Will, 9.

"*Undertake, execute, hold, or enjoy any contract*"—*See* Parliament.

Writ of Error—*See* Error.

Writ of Restitution.

The Court of Queen's Bench had at common law no jurisdiction to issue a writ of restitution except as part of the judgment on an appeal of larceny; and 21 Hen. VIII. c. 11, and 24 & 25 Vict. c. 96, s. 100, only confer this jurisdiction on the Court before whom the felon has been convicted.—*The Queen* v. *Lord Mayor of London*, L. R. 4 Q. B. 371.

## REVIEWS.

The Investigation of Titles to Estates in Fee Simple. By Thomas Wardlaw Taylor, M.A., Referee of Titles, &c. Toronto: Adam, Stevenson & Co., 1869.

The past half century has witnessed repeated efforts to clear away the obstacles standing in the way of the free circulation of real estate. Even professional men are gradually, though slowly, beginning to see that the time is coming when there must be greater facility for the sale and purchase of real estate, assimilating it more and more, in this respect, to chattel property.

One is irresistibly reminded of the dangers and difficulties which, even yet, surround the investigation of titles by a perusal of the introduction to this excellent manual of Mr. Taylor's. We notice *en passant*, amongst other points, his remarks upon the necessity in the case of deeds executed before 18th September, 1865, of having the receipt for the purchase money endorsed on the deed, in addition to the usual formal receipt embodied in the deed itself. The rule is well enough established in England, but there seems to be more doubt about it in Canada, though it is insisted upon rigorously in cases coming under the Act of Quieting Titles. The practice in former years, in this country, was not to sign separate receipts; latterly the custom has grown up of giving separate receipts as a matter of course when the deed is executed, *without any reference as to whether the consideration is then paid or not.* In either case, one is led to doubt the necessity of the rule being strictly enforced in this country (See *ante* Vol. III. N. S., p. 254). But doubtless where the applicant asks under the act for a certificate of title, good against the world, he may reasonably be asked to spare no trouble in satisfying the judge on all points that can be explained.

The remarks on page 10 as to the powers of an executor or administrator to assign the legal estate must now be noted by a reference to the late act of Ontario passed since this book was written.

Chapter I. is introductory, giving a general view of the principal duties of a conveyancer in investigating a title. Chapter II. is devoted to Registration and the requirements of the Registry Act. Chapter III. discusses Incumbrances; Mortgages; Vendor's liens; Crown debts, now happily dying out; Executions; Taxes; Special improvements under particular Statutes; Liens of Mutual Insurance Companies, not much practical advantage to them and a nuisance to every body else, and given apparently without rhyme or reason; Dower; Curtesy and Legacies. Chapter IV. speaks of Particular Titles, such as by possession, by inheritance, by will, by decree and vesting orders of the Court of Chancery, by acts of Parliament, by by-laws under powers of sale in mortgages; tax titles and Sheriffs deeds under executions. In the next two chapters, the subjects of attested copies; Covenants for production; secondary evidence and presumptions are shortly treated of; and the concluding chapter is devoted to a few remarks upon proceedings under the Act for Quieting Titles. In an appendix this act is given in full with notes, as also the orders of the Court of Chancery under the Act and Forms; the whole concluding with a full Index.

The arrangement is good, and so far as we have had an opportunity of judging, the information is reliable. Mr. Taylor's position as Referee of titles, under the Quieting Titles Act, gives him a peculiar fitness for dealing with the subject. Those having business under that act will do well to make themselves familiar with the contents of the work and so save themselves much time and trouble, and their client much expense and delay, for it cannot be denied that much of the delay of which the Court of Chancery gets the credit in matters of this kind is chargeable to want of familiarity with the working of the act on the part of the solicitors employed. With this book at their hand they cannot plead want of knowledge.

The author does not claim "that this little work will supersede, or even rival, the more extended treatises of English writers upon the various subjects embraced in it;" this of course, but nevertheless the practical conveyancer will do well to provide himself with Mr. Taylor's book as a valuable and reliable auxiliary to them, and a handy means of referring to the statutes and decisions in Upper Canada affecting the subjects, more fully and elaborately discussed elsewhere. To students it is peculiarly useful in giving them in a readable form the general principles as well as many of the practical details of a most important branch of their profession.

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The Insolvent Act of 1869, with Tariff, Notes, Forms &c. By James D. Edgar, Barrister-at-law. Toronto: Copp, Clark & Co., 1869.

This is in effect a second edition of Mr. Edgar's annotated edition of the Insolvent Act of 1864. Since then a number of cases have been decided both here and in England, which, the former particularly, are of special importance in construing the Act now in force, and will be found collected in their appropriate places throughout the work.

As this Act is applicable to the Provinces of Quebec, New Brunswick and Nova Scotia, as well as Ontario, we hope that a collection, such as that before us, of the principal cases explanatory of the Act, may tend to assimilate the practice in the different Provinces, but this, as the author remarks, cannot *ensure* uniformity, which can never be attained without rules being made to effect that object. There should be rules applicable alike to Ontario, New Brunswick and Nova Scotia, and which might be framed by a joint committee of Judges from these Provinces, with such particulr rules for each as might be found necessary, owing to any peculiar administration in the individual Provinces; though it could scarcely be expected that the Province of Quebec could join in rules which might be framed for the other Provinces, owing to the peculiarity of her laws. This might be made one step towards the assimilation of the laws in the English-speaking Provinces, referred to in the British North America Act of 1867.

The book before us is in every respect superior to the edition of 1864, both as to the matter, and in its general appearance.

There are some useful forms in the appendix, as also the tariff of fees under 27, 28 Vic. c. 17, which, by the way, has strong internal evidence of being prepared with more reference to the value of money fifty years ago than at present.

# OBITUARY.

## JUDGE MALLOCH.

We learn from a local paper some particulars of the late judge of Leeds and Grenville, whose sudden death recently took place, at the age of 73.

He was born in Perth, Scotland, on the 13th of April, 1797. He came to Canada in 1817. He studied law with the late Levius P. Sherwood, and began to practice his profession in 1825. In 1837 he was appointed judge of the Bathurst District, and of Leeds and Grenville in 1842, which office he held till last year, when he resigned. Judge Malloch was one of the five Judges appointed in 1854 to frame Rules of Practice for the Division Courts—the Rules which were in force until a recent period.

We find also from one of the Blue Books that Mr. Malloch's period of public service dates from 1820, when he was appointed Registrar of the Surrogate Court of the then Johnstown District. For a period of half a century he enjoyed the confidence of the Crown and the public.

## GEORGE HEMINGS, Esq.

We regret to record the death of Mr. George Hemings, Taxing Officer of the Court of Chancery, on 21st ult., at the age of 48.

He commenced the practice of his profeſsion by entering into partnership with Mr. Adam Crooks. He subsequently joined Mr. John O. Halt, at Hamilton. After leaving Hamilton he returned to Toronto, and formed a partnership with Mr. George Morphy. On the 10th February, 1859, he was appointed Taxing Officer of the Court of Chancery, where he secured the confidence of the judges and the profession as a most efficient and painstaking officer. He held this position until his death. His loss will be much felt, though for some time past his severe and protracted ill-health prevented him giving as much time and attention to his duties as formerly.

## SPRING ASSIZES, 1870.

### Eastern Circuit.—*Mr Justice Galt.*

| | | | |
|---|---|---|---|
| Kingston | Tuesday | March | 15. |
| Brockville | Tuesday | " | 29. |
| Perth | Tuesday | April | 5. |
| Ottawa | Tuesday | " | 12. |
| L'Orignal | Wednesday | " | 27. |
| Cornwall | Monday | May | 2. |
| Pembroke | Tuesday | " | 10. |

### Midland Circuit.—*Mr Justice Gwynne.*

| | | | |
|---|---|---|---|
| Lindsay | Monday | March | 14. |
| Peterboro | Monday | " | 21. |
| Cobourg | Friday | " | 25. |
| Belleville | Thursday | " | 31. |
| Whitby | Monday | April | 11. |
| Napanee | Wednesday | " | 27. |
| Picton | Monday | May | 2. |

### Niagara Circuit.—*Mr. Justice Wilson.*

| | | | |
|---|---|---|---|
| Milton | Monday | March | 14. |
| St. Catharines | Wednesday | " | 30. |
| Welland | Monday | April | 11. |
| Barrie | Monday | " | 18. |
| Hamilton | Monday | " | 25. |
| Owen Sound | Tuesday | May | 10. |

### Oxford Circuit.—*The Chief Justice of Ontario.*

| | | | |
|---|---|---|---|
| Brantford | Monday | March | 14. |
| Berlin | Friday | " | 18. |
| Guelph | Wednesday | " | 23. |
| Woodstock | Monday | April | 18. |
| Stratford | Monday | " | 25. |
| Simcoe | Tuesday | May | 3. |
| Cayuga | Tuesday | " | 10. |

### Western Circuit—*Mr. Justice Morrison.*

| | | | |
|---|---|---|---|
| London | Monday | March | 21. |
| St. Thomas | Wednesday | " | 30. |
| Sandwich | Tuesday | April | 5. |
| Chatham | Tuesday | " | 12. |
| Sarnia | Tuesday | " | 26. |
| Goderich | Monday | May | 2. |
| Walkerton | Monday | " | 9. |

### Home Circuit—*The Chief Justice of the Common Pleas.*

| | | | |
|---|---|---|---|
| Brampton | Monday | March | 15. |
| Toronto | Monday | March | 21. |

## CHANCERY SPRING SITTINGS, 1870.

*As finally settled by the Court.*

### The Hon. Vice-Chancellor Strong.

| | | | |
|---|---|---|---|
| Toronto | Tuesday | March | 15 |

### The Hon. Vice-Chancellor Mowat.

| | | | |
|---|---|---|---|
| Stratford | Tuesday | April | 5 |
| Goderich | Friday | " | 8 |
| Sarnia | Tuesday | " | 12 |
| Sandwich | Friday | " | 15 |
| Chatham | Tuesday | " | 19 |
| London | Tuesday | " | 26 |
| Woodstock | Saturday | " | 30 |
| Simcoe | Friday | May | 6 |

### The Hon. the Chancellor.

| | | | |
|---|---|---|---|
| Hamilton | Tuesday | April | 12 |
| Brantford | Thursday | " | 21 |
| Lindsay | Thursday | " | 28 |
| Guelph | Thursday | May | 5 |
| Barrie | Wednesday | " | 11 |
| Owen Sound | Wednesday | " | 18 |
| St. Catharines | Monday | " | 23 |
| Whitby | Friday | June | 3 |

### The Hon. Vice-Chancellor Strong.

| | | | |
|---|---|---|---|
| Ottawa | Thursday | May | 5 |
| Cornwall | Tuesday | " | 10 |
| Brockville | Tuesday | " | 17 |
| Kingston | Friday | " | 20 |
| Belleville | Thursday | " | 26 |
| Peterborough | Wednesday | June | 1 |
| Cobourg | Monday | " | 6 |

Curious Tenures.—Hugh de Saint Philbert holds the manor of Creswell, in the County of Berks, by the serjeanty of carrying bottles of Wine, for the breakfast of our lord the King, and it was called the serjeanty of the Huse, through the kingdom of England.

The Mayor and Burgesses of Oxford, by charter, claim to serve in the office of butlership to the King, with the citizens of London, with all fees thereunto belonging, which was allowed at the Coronation of King James II., and to have three maple cups for their fee. They had also, *ex gratia*, allowed a large gilt bowl and cover.

Ela, Countess of Warwick, holds the manor of Hoke Norton, in the County of Oxford, which was of the barony of D'oyly, of our lord the King in capiti, by the sarjeanty of carving before our lord the King on Christmas day, and to have the knife of our lord the King with which she carved. —*Oxford Journal.*

## TO CORRESPONDENTS.

"Observer" supposes us to be aware of the existence in several counties of a practice which he condemns. We have no knowledge of any such appointments ever having been made. "When the statutory contingencies have not happened," we believe the maxim "*Omnia presumuntur rite esse acta*" would cover the acts of the deputy. See Cro. Eliz. 669, Cro. Jac. 552, 2 Jurist, 381, 3 Camp. 432, 3 C. & P. 412, 4 T. R. 366.

"D. H. P."—The insolvency case you refer to is in the current number of the Queen's Bench Reports.

## DIARY FOR MARCH.

1. Tues. *St. David. Shrove Tuesday.* Sub-Treasurer of school moneys to report to County Auditors.
2. Wed. *Ash Wednesday.*
6. SUN. *1st Sunday in Lent.*
8. Tues. General Sessions and County Court Sittings County York
13. SUN. *2nd Sunday in Lent.*
17. Thur. *St. Patrick's Day.*
20. SUN. *3rd Sunday in Lent.*
25. Fri.. *Lady Day.*
27. SUN. *4th Sunday in Lent.*

# THE
# Canada Law Journal.

## CRIMINAL LAW CONSOLIDATION.

A good work was done last Session by the Minister of Justice in placing on the Statute Book of the Dominion a series of Acts assimilating and consolidating with valuable amendments the whole body of the Criminal Law. Something was accomplished the previous Session, and something yet remains to be done in respect to minor outlying enactments to make a perfect whole, but we can even now boast of a more complete consolidation than they have in England, and we refer to cap. 29 of 32 & 33 Vic., "An Act respecting procedure in Criminal cases and other matters relating to Criminal Law," in proof of the assertion. All the leading acts are founded on the Consolidated Criminal Statutes passed in England as models, with such alterations and modifications as were required to suit these enactments to the condition of Canada, and such as were necessary to suit the tribunals and mode of procedure in courts of the several Provinces.

These measures were all prepared after the most careful consideration by the Minister of Justice and upon conference with leading jurists and public men from the several Provinces, and were put into shape under the direction of the Minister of Justice by that very able lawyer and most experienced legal draftsman Mr. Wicksteed, the Law Clerk of the House of Commons, assisted by the Deputy Minister of Justice. Other able and experienced men, on the Bench and at the Bar, are understood to have given their advice and assistance. Indeed nothing was left undone by the Minister of Justice to secure to the Dominion a valuable and complete code of Criminal Law.

The bills were introduced in the Session of 1868 and passed the House of Commons, but owing to influences that ought not to have prevailed with any man in a matter of science, the bills were for the most part thrown over till last Session. Although great disappointment was felt at the time, the postponement had this good effect, that the bills were all again gone over by the Minister of Justice with the most searching care to discover any error and test their correctness and completeness in every particular. The bills thus prepared, matured and perfected, finally became law and came into force on the 1st day of January last.

As already observed, the standard for most of them is the English Criminal Law Consolidation, and the value and importance of this is obvious to every professional man, and indeed must be so to any intelligent person who takes the trouble to consider the subject. Such a course opens to us at once the whole of the English cases decided on these Statutes, and the learned light they cast upon the enactments will be of the greatest possible value in assisting the numerous tribunals throughout the Dominion in determining any question that may arise upon our own enactments.

We are led to make these remarks by seeing the notices given by members for amendments to the Criminal Law—laws just come into force, and we cannot but think that any attempt to alter a code only just completed, and before even a single assize has past or sittings of the Court of Sessions taken place, untimely and uncalled for. If any positive error has been discovered let it be pointed out to the Minister of Justice, and let him, as the responsible Minister, amend it. But for independent members who have not had the whole system in view to be allowed to cut and hack at a bit here and a bit there because they may deem, or their constituents may deem some alteration expedient or necessary, is not defensible on any ground, and we trust it will not be allowed. If for no other reason the move is premature, and if the door be once opened to a "tinkering" legislature, the value of the consolidation will soon be lost. We trust that the House, in the public interest, will repress those adventurous members who endeavour to make up in courage what they lack in knowledge, training and experience.

## INTERPLEADERS.

Nothing, probably, in the ordinary administration of justice strikes the observation of the uninitiated public as a grievance more than the expense too often attending the litigation of matters of minor importance, or of trifling value. There is a very natural and a very common idea that the costs of a suit should in some degree be proportioned to the amount in dispute, and this view is becoming more prevalent every day; and such is the tendency of legislation.

In one class of cases, however, no step has been taken in this country to reduce the costs in proportion to the sums litigated: we refer to interpleader suits or issues from the Superior or County Courts. These issues, being creatures of the Court, may from such fact have escaped the changes that have from time to time been made in the direction referred to; but it may well be urged that the time has come to follow the example of the legislation in England on this subject, or to take some other course which may secure the desired result, even in a more effectual manner.

It is provided by section 14 of the English Common Law Procedure Act of 1860, that,

> "Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge, whenever, from the smallness of the amount in dispute, or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules or orders therein, as to costs and all other matters, as may be just."

In this country, and in England previous to the above enactment, the consent of both parties was necessary to give the Court or a Judge jurisdiction.

Section 15 of the same Act provides that,

> "In all cases of interpleader proceedings, where the question is one of law, and the costs are not in dispute, the Judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court."

As regards the first of the two sections above quoted, the inconvenience and difficulty of satisfactorily deciding questions of fact on affidavit may be urged as an objection; and there might perhaps be some force in this, were the difficulty one which could not be obviated. This, however, is not so; for nothing could be simpler than to provide that in all cases where the appraised or sworn value of the goods seized and claimed by any one claimant, does not exceed a certain amount —say $100—the issue to decide the right to the goods shall be tried in the Division Court most contiguous to the residence of the judgment debtor.

There would seem to be no objection to some such procedure as this, as an alternative in case the Judge before whom the interpleader application might come should think it a case in which the facts should be brought out by *viva voce* testimony, and not by affidavit only. The details necessary to carry out a procedure such as this could be easily arranged.

This proposition can scarcely even be said to have the claim of novelty, for there is an analogous provision with respect to disputes as to the liability of a garnishee on applications to attach debts. The wonder is, rather, that a change has not been made before this, such as we now suggest.

A very slight experience of a lawyer's office is sufficient to prove the propriety of some such alteration of the law as we propose. Many a claimant has been prevented from litigating his claim to goods seized under an execution against another person by the mere fact that whether successful or otherwise, the costs would be more than the value of the goods. Thus it is possible that an execution creditor who is proof against costs may recover a debt by simply causing the sheriff to seize the goods of a third party; for the action against the sheriff will, under ordinary circumstances, be barred, and the claimant will (if venturesome enough to go to law), vainly perhaps, seek damages against the execution creditor or his attorney.

There is a pleasant fiction known to the law, that there is no wrong without a remedy. The only difficulty lies in this, that the remedy is very often more injurious than the wrong. We might indulge in a long train of reflections suggested by these thoughts; but as we might perhaps at length arrive at the conclusion that going to law at all is a species of insanity, we had better, perhaps, in the interests of the profession, say no more.

## STATISTICS.

We were, some time age, in common with other Editors of newspapers and periodicals in Ontario, requested to call the attention of our readers to the requirements of the Acts, 1868-'9, cap. 30, and 1869, cap. 22, respecting the registration of Births, Marriages and Deaths in Ontario. Probably, however, our delay herein has not been prejudicial to the cause so strongly advocated by the Registrar-General for Ontario in his circular, as the class of readers that we reach has sufficient intelligence to be fully alive to the importance of having a complete and accurate record of every birth, marriage and death occurring throughout the Province. In fact lawyers and public officials, more than others, necessarily see from actual experience of every-day business, the trouble and difficulty frequently arising from the want of authentic information on these subjects. In a variety of ways this information is required, and can only be obtained with much trouble and expense, and often without that certitude which alone makes it of value. Whilst urging the importance of a faithful compliance with the provisions of the statutes for the numerous purposes for which these statistics may be useful, it does not appear that the returns are to be looked upon as legal evidence, nor would it be proper that they should be at least without sufficient safeguards to prevent mistakes or frauds. At the same time, these returns will often be used for purposes where something less than legal evidence will suffice.

## SELECTIONS.

### ON PRIMOGENITURE.

The measure which Mr. Locke King has introduced into Parliament, having for its object the assimilation of the law of descent of freehold estate to that which governs the succession to personal property—in other words the abolition of the custom of primogeniture—may render some explanation of the question useful to our readers; and this, less by way of controversy on a subject which is one of admitted difficulty, than in order to aid in forming a correct opinion on a matter which comes near to the interests of a large section of the community.

1. It is then in the first place material to bear in mind that there is a very large class of interests in lands which, as not coming within the strict meaning of "real estate," is now, and from the most ancient period in our legal history has been, subject to the same law as that which regulates the title to personal property, and which is therefore free from the objections which, be they real or fancied, are considered to attach to the descent of freehold, or as the lawyers term them "fee simple," estates.* These are well known as leases for terms of years of any duration whatsoever, short or long, from one to 999 years. If the owner of this kind of property dies intestate it is divided amongst his next of kin in the proportions settled by the well-known Act called the Statute of Distributions,† as if it was so much money or goods, a system remarkable for its fairness. With respect therefore to this class of interests in land, no objection can be made as to the proportions in which it is divided amongst these who are entitled to succeed an intestate owner; in other words primogeniture, as a consequence of law, has no bearing on leasehold estate. The large districts, or parcels of land, in which so much money is invested are divided—or the value of them—amongst the widow and children or the near relatives of the intestate. He may of course by his act give the entire estate to his eldest or any other son, as he may give it to a more relative, or to one who is no relative at all. But this is not the act of the law, nor is properly chargeable as a defect in our legal system; it results simply as a consequence of ownership.

The rule—or custom as it may properly be termed—of primogeniture as an act of law distinct from the act of the party, which operates, generally speaking, on small estates held in fee simple, and then only in cases of intestacy, has it will be seen, but little if any bearing on the excessive accumulation of land in the possession of individuals, to which exception is taken as being an enjoyment of property so aggressive as to create an evil which the Legislature should interpose to remove, or at least to mitigate. Such undue accumulation arises from the acts of parties availing themselves to the fullest, and perhaps to even a vicious extent, of the power which they enjoy, and which as incident to ownership may or may not be exercised, of limiting estates so as to run, as it were, in a certain groove and be taken out of the track of commerce for a period, speaking generally, of twenty-one years beyond a life or any number of lives in being: and of tying up rents and profits for a lesser though still a considerable period. Such powers are, it is obvious, wholly unconnected with, and are indeed in their origin directly opposed to, what is known as the custom of primogeniture; a right which, supposes the owner of the estate *wholly to abstain* from the exercise of any disposing power over his property, and to leave it, by the negative act, as it were, of dying intestate, to the law to settle the course of descent; in other words, to the operation of the custom under which the estate goes to the eldest son to the exclusion of all other descendants.

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* The term "freehold" it may be observed, which is in such general use, was in its original meaning such an estate as a free man would deem worth the holding; and therefore in early times denoted an estate for life merely. The modern idea annexed to the terms "freehold" or "freeholder," signifies the whole extent of the fee: the entire interest that is, which a man can have in lands.

† This is the Act—or Acts rather, for there are two—22nd and 23rd Car. II. and 1 Jac. II. cap. 17. They were originally taken from the Civil Code, having their origin in the 118th Novel of Justinian; a source which Sir W. Blackstone (Com. ii. p. 516) is unwilling to admit, although Lord Holt and Sir J. Jekyll in former, and Chancellor Kent in modern times (Com. vol. i. p. 191) have declared that the Statute was, as they expressed it, "penned by a civilian," and to be governed and construed by the civil law.

Two things, therefore, are to be kept clearly distinct if we would form an accurate opinion on the merits of this controversy. One is the entire exemption of leasehold interests in land from the custom of primogeniture; and the other is, that the rule itself is an act of law, a consequence of intestacy, as opposed to an act of the party, the owner of the estate. That law, as it at present stands, will indeed give the estate to the eldest son to the exclusion of his brothers and sisters, provided the owner, before his death does no act to disturb its effect by such a procedure, as making his will, or executing a deed of gift; but the influence of this law is, for the reasons we have already stated, compartively restricted and exceptional. In fact, primogeniture, as a feature in our law of real property, is kept alive and perpetuated by the voluntary acts of individual owners. The evils which spring from the prevalence of this custom arise from the settlors and testators themselves, who, while still in the enjoyment of their property, and in the exercise of what are considered as the legitimate privileges of ownership, choose of their own will, and tax to the utmost the skill and ingenuity of lawyers to secure, that their land shall be so settled as to devolve in a fixed and certain channel to the furthest limits which Acts of Parliament and the decisions of courts will allow. And hence it may be inferred that the allowed partiality for limiting estates to the eldest son is more than a mere consequence of defects in our system of law, or an exceptional employment on the part of testators of the privileges which that law confers. It has a deeper root in the nature of the English people and their attachment to the soil; the desire to become holders of land, and to found a family which shall inherit it. These motives are so powerful that, as is well-known, every Act of Parliament which has been passed to encourage the alienation of land and to place it *intra commercium* earlier than would otherwise be the case, has been eluded and sometimes wholly set aside by the ingenuity of lawyers, who, instructed by testators—not unfrequently persons of obscure origin who have acquired wealth in trade—frame conveyances which have the effect of settling property to the utmost limits which an artificial and strained construction of the existing law will allow, and quite opposed to, nay, almost in fraud of, the intention of the Legislature.

II. It will be seen therefore that the measure proposed by Mr. Locke King will be very restricted in its operation, and can have comparatively but slight effect in checking the excessive accumulation of land in the hands of individual owners; which is supposed popularly to be the chief evil attached to the custom of primogeniture. In what way then it will be asked can we best deal with that tendency which leads men to acquire and entail land, and which in these days so much occupies the attention of economists and statesmen? For unless the difficulty is now fairly examined, and if possible solved, without violent or undue interference with proprietary rights, a solution of this problem, attempted at a future time and under less favourable conditions, may be attended with grave results. The remedy will probably be best found in the imposition of additional restraints on that power of testamentary alienation of real estate which seems in modern times to have reached an excessive growth. For in truth if we examine the matter, the conception of a will, especially as known to English law and English lawyers, and viewed as a method of transferring property, is one of the most artificial of all possible ideas. That a man should have during his life and while his faculties remain to him, the fullest control over what he possesses as long as such control is not at variance with public policy, seems just and right; although the Roman law, it is worthy of note, which is the most perfect model of philosophical legislation, went further than the English system in placing limits on what at the present day would be considered as a reasonable exercise of the right of ownership and testamentary capacity. But that a testator should have the power, simply at his caprice, to impose restrictions on the enjoyment of property for years after he is in his grave, and in favor of persons of whose very existence he is ignorant, and of whom it is doubtful whether they will ever come into being at all, seems *ultra vires* in the highest sense of the words. It is here, far more than in other branches of the law, that the highly technical character of the English law of real property is seen. For while bequests of personal estate, that is to say, money, chattels, leasehold interests, &c., are dealt with in the larger and more equitable spirit of the civil law, with reference to which every will of personal property is expounded, and from which the law governing such instruments has been derived, devises of real estate, that is freehold interest in the land itself, rest on principles having their origin in the feudal law, in the light of which they are still interpreted. The differences between these two classes of instruments may simply be stated thus: a will of personality is regarded as the expression of the last wishes of a testator as to what he desires should be done with his personal estate; and accordingly in this class of instruments certain fixed limits, arising partly from the nature of the property itself and partly from the source from which the law that regulates it is taken, have from the earliest times in our legal history been imposed, which the testator is not allowed to transgress. But wills of *real estate* are not in contemplation of law regarded as testaments at all in this sense, but are viewed and conveyances, documents of title—the fact of death being as it were eliminated—operating to transfer particular lands to a particular devisee, subject to all the limitations and conditions by which the caprice or vanity of the settlor or testator may choose to fetter the enjoyment of the lands granted or devised.

III. The amendment needed, therefore, is in the law of testate rather than of intestate succession; and the reform should be made to include those cases where property is limited by instruments other than wills, such as, for instance, marriage settlements. Further, the law which regulates the limit during which the *corpus* of an estate can be tied up should be assimilated to the period during which the accumulation of rents and profits is permitted. But the chief step should be in the direction of restraint on the excessive power of alienation now enjoyed, by preventing as well the estate itself as the rents and profits issuing thereout from being settled or devised so as to accumulate for any period longer than the survivor of three lives in being at the same time. This period is analogous to that allowed by the Roman jurists;* it is already familiar to lawyers as a not unreasonable restriction upon dispositive powers; it would, it is believed, not be unfair towards the tenants either for life or in remainder under existing limitations, while it would have the effect of enabling the owner to make the land an article of commerce one generation earlier than is now the case.

Another point—which can here be noticed only in outline—deserves attention as bearing upon this difficult and interesting subject. In cases of intestate succession the descent of real estate to distant heirs and the devolution of personalty to distant kindred, commonly involves, as has been remarked by a learned writer, an amount of litigation, the abolition of which would be desirable. In these cases, while the claims of those who set up a title to the estate are remote, questions are raised of great intricacy, which in many cases lead to property being wasted in protracted and expensive contention. It is open to argument how far—that is to say, extending to what degree of kinship—such claims should be recognised as conferring a title to property at all; especially where, as sometimes happens, the estate or interest devolves unexpectedly upon persons who, from ignorance or other causes, are incapacitated from making a proper use of the wealth which they never at any time had reasonable grounds for regarding as their own. In such cases as these it would seem just that the claims of the public, of the country that is, in which a man has lived, and which has extended to him and his property the protection of its laws, should be held paramount to those of one who, as in the case of real estate, may found his title on his descent from the *most remote* male paternal ancestor of the intestate, or who claims a share in the personalty because he chances to be a survivor of many, standing, probably, in the fifth or sixth degree of kindred to the deceased owner.*

The proposal to apply in these cases the property to State purposes in diminution of public burdens, has the support, amongst others, of Mr. Hill;† and besides the equity of the proceeding itself, it is to be kept in mind that its adoption would inflict no injury on those from whom is merely withheld that which they never looked to enjoy. And as against persons who stand in such a remote degree of relationship to the ancestor, there is also the presumption, arising from his testamentary silence, that if he was not in favour of, he was at least, not opposed to, the appropriation of his property by the State; a body which may not unreasonably be considered as having as strong demands on such undisposed of interests as remote relatives for whom he cannot be shown to have any partiality, and of whose very existence perhaps he was not even aware.—*Law Magazine.*

## SECURITY FOR COSTS.

The principles upon which the law as to security for costs is founded have not as yet been carried to their legitimate consequences. The existing legislation on the subject is based on the principle that it is productive of individual hardship and public inconvenience that a man should be brought into court to answer a complaint without reasonable security that he will be repaid his expenses in the event of the complaint turning out to be unfounded. If some such principle of natural justice, or public policy (whichever it be called), were not recognized, it would be impossible to justify the law which requires security to be given by a plaintiff residing out of the jurisdiction. On the other hand, if this principle be well founded, why is its application confined within such narrow limits, and not applied to all cases in which the defendant is without security for the payment of his costs, if successful? This is a question which has often been asked, and to which no satisfactory answer has as yet been given. On the one hand, it would be monstrous to shut the doors of the courts to all but the rich. A man's disabillity to give "security for costs" may be owing to the very wrong for which he seeks redress. It would be iniquitous to place it in the power of a wrongdoer to leave his victim without legal redress by the simple expedient of completing his ruin. This would be a violation of the fundamental principle of Magna Charta, "*Nulli negabimus justitiam aut rectum.*" Nay, it would deny justice precisely where it is most needed; for a debt or injury of which the rich man thinks little, may be a matter of life and death to the poor. To enact that in no case should a pauper plaintiff be permitted to proceed with an action at law or suit in equity, without giving security for costs, would therefore offend against a fundamental principle of natural justice far more sacred and inviolable than that upon which legislation has acted in affording to defendants their existing protection.

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* See Justinian's Institutes, Bk. ii., tit. 16. Maine's Ancient Law, p. 227.

* See Mr. Joshua Williams' work on Personal Property, p. 195, where this view is advocated.

† Political Economy, Vol. I. p. 272.

The practical question is, how these principles may best be reconciled: the poor man enabled to enforce his just rights, and the public protected against groundless litigation, undertaken by those to whom their liability to costs, if unsuccessful, has no terrors. *Cantabit vacuus*—as well before the sheriff's officer as before the robber. There is a class of actions known as speculative which are by no means identical with those in which the plaintiff is a pauper. An action, for example, by a pauper on the foot of a bill of exchange, or a suit in equity by a pauper for the construction of a will or deed under which he claims, could scarcely be called "speculative," unless by a very wide extension of the term. Can no means be devised of distinguishing between the two classes of cases in which the plaintiff is not a mark for costs, allowing him to proceed in any proceeding which is legitimately instituted to enforce a fair claim, or to obtain redress for a substantial injury, but requiring sufficient security where the action really belongs to the class known as "speculative?" It is perfectly impossible to notice this distinction by any hard and fast line, drawn by the Legislature. If it is to be made at all, it must be by virtue of a discretion vested in some tribunal. We are strongly in favor of the creation somewhere of a discretionary power to require security for costs from litigants—plaintiffs or defendants—in any proceeding where it is shown, first, that in the absence of such security, the opposite party, if successful would lose his costs; and secondly, that having regard to the nature of the action, the relation of the parties, and the circumstances of the case, it would be productive of hardship or injustice that proceedings should be carried on without such security. Probably this power might best be conferred upon the master of the court; but these and other questions of detail must be considered at a future time. We desire at present to call attention to what we cannot but consider a serious blot in our judicial system.—*Irish Law Times.*

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# ONTARIO REPORTS.

## COMMON LAW CHAMBERS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Orok v. Garvin.

*Certificate for full costs—Overflowing land—1s. Damages.*

Under the Statute of Ontario, 31 Vic. ch. 24, sec. 1, a judge should certify for costs where he would have done so under the repealed section of the C. L. P. Act.

In an action for overflowing plaintiff's land, the defendant pleaded not guilty, and the jury found for plaintiff and 1s. damages.

*Held*, that under the circumstances of the case (there being important rights at stake, and it being such a case as would properly be removable from an inferior Court by *certiorari*), the plaintiff was entitled to a certificate for full costs under 31 Vic. ch. 24, sec. 1 (Ont).

[Chambers, December. 1869.]

This was an action for overflowing plaintiff's land by a dam maintained by defendant. The plea was not guilty. The jury found for plaintiff and one shilling damages. The plaintiff's counsel moved for the necessary certificates to entitle him to full costs, and to deprive defendant from setting off costs.

*McCarthy*, for plaintiffs, subsequently, on notice to the other side, renewed his application before the Chief Justice who tried the case. He contended that the action was really brought to try a right besides the right to recover damages, and that it was not a case of the kind proper to be tried in the County or Division Courts: that the act of defendant was such as might, if permitted, ripen into a right; and plaintiff was bound to bring an action to prevent this, and his action could only properly be brought in a proper court of record, so that, in the event of it being necessary to shew a recovery by the plaintiff in answer to a plea of enjoyment as of right for twenty years or more, he could prove the recovery by record made up with pleadings, postea, judgment, &c. If it were a case that was completely within the jurisdiction of the County Court, and the plaintiff could have known that at the outset, yet as the decision of the question raised in it might deprive the owner of the mill occupied by the defendant of a valuable right—viz., to raise the water to work the mill—plaintiff might well think that if he had brought the action in the County Court, the defendant would have applied to remove it by *certiorari*. Independently of this the law on the subject of riparian rights has recently been much discussed in England, and a question of great difficulty might arise in a suit of this kind.

*Boys*, for the defendant, contended that in this action it was simply decided that defendant had by his act injured the plaintiff to the extent of one shilling. The pleadings raised no question of right, and there was no more necessity for bringing this action in the superior courts than there would have been if defendant had cut a tree on the plaintiff's land, and the latter had brought an action to recover damages for the trespass, defendant setting up no right to commit the trespass, but merely denying the fact: *Emery* v. *Iredale*, 7 U. C. L. J. 181; *Thompson* v. *Crawford*, 9 U. C. L. J. 262; *Mitchell* v. *Barry*, 26 U. C. Q. B. 416; *Marriott* v. *Stanley*, 9 Dowl.

P. C. 59; *Shuttleworth* v. *Cocker, Ib.* 77; *Morrison* v. *Salmon, Ib.* 387.

RICHARDS, C. J.—The words of the section of the Common Law Procedure Act were the same as those of the Imperial Statute 3 & 4 Vic. cap. 24, sec. 2. The first part of section 1 of the Statute of Ontario, 31 Vic. cap. 24, sec. 1, is to the same effect as the Imperial Statute referred to. "If the plaintiff in any action of trespass, or trespass on the case, recovers by the verdict of a jury less damages than eight dollars, such plaintiff shall not be entitled to recover, in respect of such verdict, any costs whatever, whether the verdict be given on an issue tried, or judgment has passed by default, unless the judge or presiding officer before whom such verdict is obtained, immediately afterwards, or at any future time to which he may postpone the consideration of the matter, certifies on the back of the record, in the form hereinafter provided, to entitle the plaintiff to full costs," &c. Under the Imperial Statute and the Common Law Procedure Act the proviso is to the effect, that the statute should not apply if the judge "certifies on the back of the record that the action was really brought to try a right besides the right to recover damages for the trespass or grievance complained of, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." In the Statute of Ontario this proviso is entirely omitted, and it is left quite in the discretion of the judge to certify, to entitle the plaintiff to full costs or not. The decisions under the repealed act may nevertheless be looked at, for I apprehend that under the existing statute the judge would certify when he would have done so under the repealed section of the Common Law Procedure Act.

In *Shuttleworth* v. *Cocker*, 9 Dowl. P. C. 82, Tindal, C. J., in referring to the English act said, "I take the object of this act to be to prevent plaintiffs from bringing actions of a vexatious and litigious nature, where only a small damage has been sustained, and where no right whatever is in issue between the parties; and if actions are brought in such instances, certificates cannot be granted, and the plaintiffs lose their costs." That was an action wherein the plaintiff, the owner of a house, complained of the defendant, who was the owner of a mill and workshop, that he used the engine, &c., on his premises, so that noise, smoke and injurious dust came from them and injured the plaintiff's house, and rendered it uninhabitable. The defendant in answer pleaded not guilty, that is, he denied that that which was stated on the face of the declaration had taken place. The learned Chief Justice then proceeds: "Looking at these circumstances the plaintiff declares that his house is rendered uninhabitable by reason of the defendant's acts, and on the other side the defendant, insisting on going on with the works which he has commenced, and which the plaintiff says form the ground and gravamen of his charge, who can say that a question of right does not arise between the parties. The plaintiff complains that his right to his house, free of the nuisance which is alleged on the record, is invaded, and the defendant says on the other side that this, which is alleged to be a nuisance, is in fact none at all. Therefore looking at the facts of the case it does not appear to be one in which the plaintiff is going on vexatiously, or for small damages only, but that it is a case in which the right came in question. On the evidence which was adduced the case took the same course. The defendant strove not so much to prove that the plaintiff had sustained very small damages only, and the cross-examination was very much directed to that point, as that the defendant had adopted modes of carrying on his manufactory with as little injury as possible, still maintaining his right, however, to carry on the same business. Therefore, in my opinion, it is an action really brought to try a right besides the mere right to recover damages; and one cannot but ask why, if it were not so, the defendant did not admit the right of action and proceed only on that part of the case which would be directed to the mitigation of damages."

Bosanquet, J., in his judgment, said: "In order to support the defendant's view, the action must not have been brought to try the right, and the defendant must have admitted he had no right to do the act; and if the real question was as to the damages only, there is no doubt that it would be a case in which the judge should not have certified. * * * The defendant insisted that he was not in the wrong, that he was right; and, in consequence, the plaintiff had no right to maintain the action."

In *Morrison et al.* v. *Salmon, Ib.* 392, the case above cited is approved of, and in reference to it, Bosanquet, J., said: "Nuisance may either be brought to recover damages for an injury to an acknowledged right, or to try a question whether the defendant has or has not a right to do that which he has done, which is very commonly the subject of question in an action of this sort." Maule, J., said: "Supposing the plaintiffs had proceeded in the Court of Chancery for an injunction * * * and the Court had said that there was some uncertainty as to their rights, and that they must establish it in a court of law. The plaintiffs must in that case bring their action in order to substantiate their right; and if the argument which has here been brought before the Court were to prevail, they would be deprived of their costs."

It appeared at the trial of this case that the persons under whom defendant held had taken a lease of the land overflowed from the plaintiff, which had expired, and plaintiff was willing to grant a lease to defendant for the term for which he had agreed to take the mill, at a small rent, and that defendant had declined to take this lease.

Under the facts of this case, and under the decisions referred to, I am of opinion, if this action had been one which was exclusively within the jurisdiction of the Superior Courts, I should have felt bound to certify under the first section of the act of Ontario to entitle the plaintiff to full costs.

The defendant did not content himself with admitting he had overflowed defendant's land, and contending that only small damages were committed, but, as stated by Chief Justice Tindal, in the case referred to, had stoutly contended that his dam did not overflow plaintiff's land at all. He did not admit that he had not the right to keep his dam up to its then height, and pen back the water as it was then penned back, but contended that the right he exercised did not interfere with plaintiff's land. Surely this right was tried, and comes within the principle of the case referred to.

It is contended that this suit is of the proper competence of the Division or County Court. The action in form is not out of the jurisdiction of either of these Courts, and the amount given by the jury as damages does not put the case properly in a superior court. The plaintiff contends, and the jury have found, that the defendant has prevented the water of the stream passing through his land from flowing in its natural course, and has penned the same back on the land of the plaintiff. He contends, if this had been allowed to continue for twenty years, it would create a right, and therefore he was acting properly in bringing this action to prevent an easement prejudicial to him being acquired as to his property. And he was equally warranted in bringing the action in this court, on account of the difficult questions of law likely to arise in the course of the action, and the propriety of having the action in a superior court of record to prove the recovery when necessary.

In this particular case the defendant contended at the trial, and called witnesses to prove, that the plaintiff's land was not overflowed by the dam used by him. The jury, nevertheless, found against him on the facts brought out on the plaintiff's case. The defendant had refused to take a lease at a small rent, and both parties went down to try a case involving apparently important interests to them, and each called a large number of witnesses, including a surveyor on either side. Suits such as these are not usually tried in the inferior courts, and when commenced there would be bound to be removed into the superior courts almost as a matter of course, on the application of the defendant. If the plaintiff, however, went on in the inferior court, and the title to land was raised on the pleadings, or on the trial, the suit would at once stop. Whilst the law is in this state, I do not think it unreasonable that actions like the present, under the facts shewn, should be commenced in the superior courts.

If the law is changed so that when the question involving jurisdiction is raised in the inferior court the case can be readily transferred to the superior court, then the court and judges will feel less embarrassment in disposing of questions of costs when verdicts for an amount within the jurisdiction of the inferior court are rendered in cases tried in the superior court, when the excuse suggested for taking the cause into the superior court is that they feared the defendant might take a course not necessary to try the merits of the cause, to oust the inferior court of its jurisdiction.

*Certificate granted.*

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### The Queen v. Murdoch McLeod

*Change of venue in criminal cases—32, 33 Vic., cap. 29 sec. 11.*

*Held*, that 32, 33 Vic., cap. 29, sec. 11, does not authorize any order for the change of the place of trial of a prisoner, in any case where such change would not have been granted under the former practice, the statute only affecting *procedure*.

[Chambers, Jan. 5, 1870.]

The prisoner in this case was under recognizance to appear at the next Assizes, at Kingston, in the county of Frontenac, to answer a charge of manslaughter.

*W. Mortimer Clark*, on behalf of the prisoner, applied under the provisions of 32, 33 Vic., cap. 29, sec. 11, entitled "An Act respecting procedure in criminal cases, and other matters relating to criminal law," for an order to change the venue from the county of Frontenac, to the county of York, upon an affidavit in which the prisoner stated that he was informed and believed that all the witnesses intended to be examined on behalf of Her Majesty at his trial, resided at the City of Toronto: that any witnesses to be examined on his own behalf at his trial, resided at or near the City of Toronto, and that he was unable to pay the expense of the attendance of witnesses on his behalf, and the counsel he desired to retain at his trial, if it should take place at the City of Kingston.

*Leith*, shewed cause for the Attorney-General.

It would be a bad precedent to allow a change of venue on the grounds disclosed. The Act gives no jurisdiction to a judge to change the venue on these facts and the mere poverty of the prisoner is no sufficient reason.

The statute is not intended to give any new ground for changing the venue, but merely to simplify procedure, and to prevent the necessity of proceeding under the old and inconvenient practice of removing the case into the Queen's Bench by certiorari, and then moving to change the venue. The affidavit at all events is insufficient, as it does not shew the particulars as to witnesses, &c., required by the practice on applications to change the venue.

*Clark, contra.*

It is a mere matter of discretion with the judge, and owing to the poverty of the prisoner "it is expedient to the ends of justice" that the place of trial should be changed.

Galt, J.—Section 11, is as follows: "Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice, that the trial of any person charged with felony or misdemeanor should be held in some district, county, or place, other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court at which such person is, or is liable to be indicted, may at any term or sitting thereof, and any judge who might hold or sit in such court, may at any other time order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county, or place within the same Province, to be named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereof caused to the accused, as the court or judge may think proper to prescribe."

In the affidavit there is no allegation that the accused is apprehensive that a fair trial cannot be had in the county of Frontenac, as was the case in *The King* v. *Holdew*, 5 B. & Ad. 347, and *The Queen* v. *Palmer*, 5 El. & Bl. 36 In the former case the application was refused, but it was granted in the latter on the consent of the Attorney-General.

It appears to me that the contention of Mr. Leith in this case is the correct view of the intention of the Legislature, namely, to substitute proceedings like the present for the old practice of removing the case by certorari into the Queen's Bench, and then moving to change the venue, and that an order such as prayed for, should be made, only in cases when under the former practice, a change of venue would have been granted; in other words, "when it is expedient for the ends of justice that the trial should be held in some other place than that in which the offence is supposed to have been committed." It is quite clear that no such change would have been made in this case, and therefore the present summons should be discharged. There is no saying to what inconvenience the granting of applications like the present might not lead.

*Summons discharged.*

## COUNTY COURT CASES.

### In the matter of Sutton, Landlord, v. Bancroft, Tenant.

*Overholding Tenants Act—Assignee af reversion.*

Under the Overholding Tenants Act, 31 Vic. cap. 26, the word "landlord" includes the assignee of the reversion.

The late Act affords a more extensive as well as a more expeditious remedy than any former statute.

[Hughes, Co. J., St. Thomas.]

The facts of the case were, that one Burtch demised the premises to this tenant for a term which had expired, but before the end of the term conveyed the reversion to Sutton, who claimed the possession as landlord.

*Ellis*, as attorney for the tenant, denied the relation of landlord and tenant within the meaning of the Act, upon which alone the County Judge had jurisdiction. Proof of title and of the lease having been made from Burtch to Bancroft, and no attornment shewn from Bancroft to Sutton, Mr. Ellis claimed to have the proceedings quashed and the application discharged for want of privity between the parties, and that the fact of his being in possession did not constitute Bancroft Sutton's tenant: nor did the assignment of the reversion constitute Sutton Bancroft's landlord. The notice to quit and demand of possession were admitted.

*McDougall*, counsel for the landlord, cited the 13th section of the Act as to the meanings of the words "tenant" and "landlord," whereby they have assigned to them interpretations which their ordinary signification do not import, and referred to *Nash* v. *Sharp*, 5 C. L. J., N. S., 78, as good authority under the former statute, but not under the Ontario Act, for by the interpretation of the 13th section no room whatever is left for doubt.

Hughes, Co. J.—In the Act, 4 Wm. IV. Cap. 1, I find an interpretation clause (sec. 59), but no such meanings attached to the words "landlord" and "tenant" as are assigned them by the 13th section of the Ontario Act, nor do I find them in the Con. Stat. of U. C. Cap. 27. The Act 27 & 28 Vic. cap. 30, affords a more expeditious remedy for cases coming within the meaning of the previously existing statute, but I find no extension as to the kind of cases which might be reached by that remedy, so that up to the passing of the Ontario Statute, 31 Vic. Cap. 26, any decision of the Superior Courts as to the extent of the remedy and the class of cases coming within the purview of the then existing statutes would apply and be authoritative Not so, however, since the passing of the statute now in question, because the word "tenant" is thereby declared to mean and include an occupant, a sub-tenant, under-tenant (if there be any difference between "sub" and "under") and his and their assigns and legal representatives: and the word "landlord" is declared to mean and include the lessor, owner, the party giving or permitting the occupation of the premises in question, and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives. I think that *Bonser* v. *Boice*. 9 U. C. L. J. 218, does not apply as an authority in this case, for the statute in question affords not only a more expeditious but a more extensive remedy than was ever devised or contemplated by any previously existing statute, and no room is left for a well founded doubt that the word landlord includes the assignee of the reversion.

I therefore decide, 1st. That this is a case clearly coming within the meaning of the second section of the Act. 2nd. That the tenant, Bancroft, holds without color of right, and was tenant, &c., for a term which has expired, and wrongfully refuses to go out of possession thereof, &c.

*Writ of possession ordered.**

In the County Court of the County of Elgin.

### Decow v. McCallum et al.

*Trial by proviso.*

Trial by proviso, *held* not to be in force in this country.

[Hughes, Co. J., St. Thomas.]

This was an application by the plaintiff to set aside a nonsuit had upon a trial by proviso, the defendant having carried down the cause, and the plaintiff not appearing,—on the following grounds.

1st. That the defendant did not give the plaintiff notice to proceed as required by the 227th sec. of the C. L. P. Act.

2nd. That trial by proviso is abolished in the Courts of Record in Ontario and a new practice substituted for it by the C. L P. Act, and

3rd. Because no issue book or copy of issue was served or delivered by the defendants before proceeding to trial.

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* By an error of the press in the last number an editorial note to this case, which should have appeared in another place, was inserted as part of the judgment; therefore insert the case again. See *ante*, page 33.

Hughes, Co. J.—I shall dispose of the 2nd ground of objection first, because it is the most important, and a disputed point in the profession, and it would seem not as yet settled by any definite authoritative decision of the Courts. I find, however, that the present learned Chief Justice of Upper Canada in the Practice Court, in *Carscallen* v. *Moodie*, 2 Prac. Rep. 254, said, "I see nothing in the statute to deprive a party of his right to bring a cause down by proviso, &c." and further on,—"I see nothing in the statute to prevent defendants from taking the cause down in the way they have done." This decision I must take at present to be binding upon me in this matter. The judgment of Mr. Justice Gwynne, in Chambers, in *Summerville* v. *Joy et al.*, 5 C. L. J. N. S. 208, goes undecidedly to confirm the same view, for he says, "It would seem that our courts do not consider that the trial by proviso is abolished, for we have also a rule which is in the words of the statute, that no Rule for trial by proviso shall be necessary," and again, "I am not prepared to say that this mode of proceeding is abolished;" and, further on, "it is a proper point for the court to determine, and I shall not make an order which might probably deprive the defendants of what might prove to be their right, &c." These opinions negatively affirm the right, but were it not for their existence I should not have hesitated to set aside the nonsuit in this case as irregularly obtained, from the fact that I should have regarded the defendant's proceeding as a nullity, because the old mode of trial by proviso is legally abolished; it would, however, be presumptuous in me to set up an opinion against those of the two learned judges who have expressed opinions to the contrary (although neither of them was very decided) upon this subject. I feel it my duty however, in vindication of my own opinion, to say, that in examining the various statutes passed from time to time containing provisions for regulating the practice of our Superior Courts of Common Law; I find none which ever expressly or impliedly introduced the system of trial by proviso, and none which expressly embodied the practice of the Superior Courts of Common Law in England with that of our Courts. Of course the provision of 2 Geo. IV. c. 1 sec. 24, whereby the statutes of jeofails and of limitations, and the several statutes for amendment of the law (excepting those of mere local expediency in England) in so far as they provided for the practice of our courts were embodied; the provision of that statute, I apprehend, brought into force in this Province the provision of the statute 14 Geo II. c. 17, which provided for the moving for judgment as in the case of a nonsuit, where the plaintiff did not proceed to trial according to the practice of the court. By the rule of M. T., 4 Geo IV., the practice was no doubt provided for, because it sets forth that "in future the practice of the court is to be governed (where not otherwise provided for), by the established practice of the court of King's Bench in England: and we find the practice of trial by proviso expressly recognised before the passing of the C. L P. Act, in *Doe Davidson* v. *Gleason*, 9 U. C. Q B. 607. Chief Justice Robinson said with regard to it, "although the trial by proviso is now in a great measure disused, the remedy by obtaining judgment as in case of a nonsuit being commonly resorted to." And further on, "The trial by proviso is given for his (defendant's) protection in proper cases, that the case may not be kept hanging over his head vexatiously." The practice however, since that decision, appears to be otherwise provided for, and the rule of M. T., 4 Geo. IV., abrogated, and all the statutory provisions settling the practice appear to be also swept away, for our C. L. P. Act in section 1 provides, that in the Superior Courts of Common Law and County Courts the process and procedure shall be as therein set forth. The 227th section provides for a case like the present. If the plaintiff neglects to go to trial within the time therein specified after issue joined, a certain procedure is prescribed, and the old procedure being done away by the 223rd section, so far as related to judgment as in case of non-suit, I think, with all submission to the opinions I have already referred to, we have no practice but that which is to be found in the C. L. P. Act, or in the rules of practice framed and passed by the Judges since it was passed, and the rule of M. T., 4 Geo. IV.; and, all previous rules being abolished by the Rule of Trinity Term, 20 Vic. (Har. C. L. P. Act 1st ed., 591), and the new practice rules, providing nothing on this subject beyond what the statute prescribes—this mode of proceeding to trial by proviso is abolished. It is true the Imperial C. L. P. Act preserves this right of trial by proviso in the Superior Courts of Common Law in England, but, whilst I candidly admit that no inference ought to be drawn from that circumstance, or because of its omission from our statute, (for our courts cannot take judicial notice of the fact that our Legislature adopted very largely the provisions of an Imperial Statute, and omitted or changed others), and that the mind of our Legislature is not to be interpreted by what has been copied from the Acts of other Legislatures, whether British or Foreign: that it is only proper to gather and interpret what is intended by what is expressed in our local or Provincial Acts, and by what has been the course of legislation and what authority the courts have exercised in establishing the practice on a given subject, I think the mere negative reference to the mode of trial by proviso in the 227th section of the C. L. P. Act, and the new rules by enacting that "*no rule for trial by proviso shall hereafter be necessary,*" with all the old practice abolished and a new mode of proceeding provided, suggests very little from which it may be inferred that the right to that mode of trial is preserved to a defendant.

As to the other grounds urged, I think they do not form reasons for setting aside the nonsuit; the first would be a valid objection to the entry of a judgment for defendant's costs if the notice referred to had not been given. The *rule* for trial by proviso is abolished and made unnecessary, and the notice of trial by proviso is all that is necessary of that proceeding were correct: 1 Pat. Mac. and Mar. 816. The third objection, if it were a ground for setting aside the notice of trial, is a matter of practice (if necessary) which should have been moved against promptly and not kept in reserve for an application like the present; in my view however, it was unnecessary for the defendants to deliver the issue which had not been at all changed since the plaintiff delivered it on 31st May, 1869, and as Mr. Hallowell, the defendant's attorney, swears the plaintiff delivered it then, I can see no occasion that existed for the defendant to deliver it afterwards, on taking the next step in the cause: there is no time limited for making up the issue, when the pleadings on both sides are concluded. The plaintiff's attorney, according to the practice in the Imperial Courts of Common Law, makes up and delivers the issue to the opposite party for the purpose of proceeding to trial; if the plaintiff will not do so nor proceed to trial within the time allowed by the practice, the defendant may make up and deliver it to the plaintiff's attorney, in order that he may proceed and (in England), carry down the record to trial by proviso: 1 Pat. Mac. and Mar. 207. If the issue has been delivered once it answers for all purposes—I think therefore, there is nothing in this objection, and if there were, the plaintiff should have moved against it in Chambers long ago,—and not deferred it until the Term as a motion to set aside a non-suit.

*Rule discharged.*

## ENGLISH REPORTS.

### PRIVY COUNCIL.

### Martin v. Mackonochie.

*Practice—Disobedience to monition—Evasive compliance—Church of England—Communion service—"Kneeling."*

A clerk in holy orders having been admonished not to kneel during the prayer of consecration in the communion service, and it having been afterwards his practice to bend one knee in sign of reverence at certain parts of the prayer, in such a manner that occasionally his knee momentarily touched the ground, though without any intention on his part that it should touch the ground, and the genuflexion being such that the congregation could not distinguish whether his knee touched the ground or not.

*Held*, that there was a disobedience of the monition, there having been a literal non-compliance, or, if a literal compliance, such an evasive compliance as must be treated as a non-compliance.

[18 W. R. 217.]

In this appeal a motion was now made to enforce a monition issued against the respondent, the Rev. A. H. Mackonochie, in pursuance of an Order of Her Majesty in Council, of the 14th of January, 1859, confirming a report of the Judicial Committee, of the 23rd December, 1868: 17 W. R. 187, L. R. 2 P. C. 365.

The appeal was from a decree of Sir Robert Phillimore, official principal of the Arches Court of Canterbury, in a cause of the office of judge, promoted by John Martin against the Rev. A. H. Mackonochie, incumbent and perpetual curate of the new parish of St. Albans, Holborn, in the diocese of London. The articles exhibited in the Arches Court charged the respondent with having offended against the laws ecclesiastical in the following respects:

By having during the prayer of consecration in the order of the administration of the Holy Communion, elevated the paten above his head and permitted and sanctioned such elevation; and taken into his hands the cup, and elevated it above his head during the prayer of consecration, and permitted and sanctioned the cup to be so taken and elevated; and knelt or prostrated himself before the consecrated elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostrating by other clerks in holy orders.

By having used lighted candles on the communion-table during the celebration of the Holy Communion at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

By having used incense in the manner in the articles mentioned.

And, by having, as in the articles mentioned, mixed water with the wine used in the administration of the Holy Communion.

In the articles as originally framed the charge against the respondent with regard to the elevation of the cup and paten was wider (see the judgment of the Judicial Committee), but on account of of its vagueness in a certain part it was reformed by order of Dr. Lushington, then dean of the Arches Court, and as reformed it stood as above.

By decree of 28th March, 1868, Sir Robert Phillimore (16 W. R. 604, L. R. 2 A. & E. 116) monished the respondent to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, as also from the use of incense, and from the mixing water with the wine during the administration of the Holy Communion, "as pleaded in the said articles." From this decree the promoter appealed in so far as the decree did not admonish the respondent against kneeling or prostrating himself before the consecrated elements during the prayer of consecration, and against permitting and sanctioning such kneeling or prostrating by other clerks in holy orders, and against using lighted candles on the communion-table during the celebration, and against permitting and sanctioning such use. The Judicial Committee reported to her Majesty, on the 23rd December, 1868 (17 W. R. 187, L. R. 2 P. C. 365), their opinion that the decree ought to be amended, that the principal cause ought to be retained, and therein, that, in addition to the matters from which the respondent was by the decree monished to abstain, the respondent ought to be admonished to abstain from kneeling or prostrating himself before the consecrated elements during the prayer of consecration, and also from using lighted candles on the communion-table during celebration, when they were not wanted for the purpose of giving light. Her Majesty in Council, by Order in Council, dated the 14th January, 1869, approved of the report, and ordered that it should be observed and carried into execution. A monition, in the name of her Majesty, under seal of her Majesty's Court of Appeals, issued on the 19th January, 1869, commanding the respondent "to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from the use of incense, and from the mixing water with the wine during the administration of the Holy Communion, and from kneeling or prostrating himself before the consecrated elements during the prayer of consecration, and also from using lighted candles on the communion-table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light."

December, 2, 4.—A motion was now made before the Judicial Committee on the part of the appellants, praying the Committee to declare that the respondent had not complied with this monition, inasmuch as he continued (1), to elevate the cup and paten during the administration of the Holy Communion; (2), to kneel or prostrate himself before the consecrated elements during the prayer of consecration; (3), to use lighted candles on the communion-table at times when such candles were not wanted for the purpose of giving light; the appellants further prayed that the monition might be enforced in such a manner as to the Committee might seem fit.

In support of the motion affidavits were filed, stating, amongst other things, that on certain days therein mentioned, the respondent in celebrating the communion service, when he came to that part of the prayer of consecration, at which the rubric directs the priest to take the paten into his hands, paused in reading the prayer; that during such pause, and before taking the paten into his hands, he bowed himself down to the communion-table, so that his forehead nearly touched it, he then stood upright, and immediately afterwards knelt down upon the steps leading to the communion-table, that, after kneeling for a few seconds, he rose and again stood up and took the paten into his hands, and raised it level with his head; that he then replaced the paten upon the communion-table; that he then again bowed down to the communion-table so that his forehead nearly touched the same; he then again stood upright, and immediately afterwards knelt down upon the steps leading to the communion-table; that after kneeling for a few seconds he again rose, stood up, and proceeded with the said prayer of consecration, until he came to that part at which the rubric directs the priest to take the cup into his hands; he then again paused in reading the prayer; that during such pause, and before taking the cup into his hands, he bowed himself down to the communion-table, so that his forehead nearly touched it; he then stood upright, and immediately afterwards knelt down upon the steps leading to the communion-table; that after kneeling for a few seconds, he again rose and stood up, and took the cup into his hands and raised it level with his head; he then replaced the cup upon the communion-table; he then again bowed down to the communion-table, so that his forehead nearly touched it; he then rose and stood upright, and immediately afterterwards knelt down upon the steps leading to the communion-table; that after kneeling for a few seconds he again rose, stood up, and proceeded with the prayer of consecration; that at the commencement of the morning prayer there were eight lighted candles upon a shelf, about six inches above the level of the communion-table, and which appeared to form part thereof, two of such candles being in candlesticks, and six in two candelabra, holding three candles each, such candlesticks and candelabra standing upon the shelf; the eight candles were extinguished immediately before the commencement of the communion service, up to which time they were kept continuously burning; such candles were not required for the purpose of giving light.

In opposition to the motion affidavits were filed, in which the respondent denied that since the service of the monition upon him, he had ever prostrated himself or knelt upon steps leading to the communion-table or elsewhere when celebrating the Holy Communion, during any part of the consecration prayer; but he admitted that it was his practice, during the prayer of consecration, when celebrating the Holy Communion, and whilst standing before the holy table, reverently to bend one knee at certain parts of the prayer, and occasionally, in so doing, his knee momentarily touched the ground, but such touching of the ground was no part of the act of reverence intended by him; and he alleged that ever since the monition was served upon him he had endeavoured to obey it, and had never, intentionally or advisedly, in any respect disobeyed it, or sanctioned any practice contrary to its provisions. The Rev. H. A. Walker, curate to the respondent, deposed further that, having regard to the position of the celebrating and assisting priests during the consecration prayer as well as to the length and nature of their dress, he did not believe it possible for any person in the body of the church to say whether the respondent did kneel or not.

*A. J. Stephens*, Q. C. (*Archibald* and *Droop* with him), in support of the motion, contended that the monition must be construed in accordance with the Book of Common Prayer; that the elevation of the cup and paten to the level of the head was inconsistent with the directions of the rubric, and in contravention of the monition; that the respondent according to his own admissions, had, during the prayer of consecration, done acts which amounted to a kneeling; and that he had prostrated himself in disobedience to the monition.

*Mr. Mackonochie*, in person, contended, in opposition, that even if the monition had been disobeyed, the Judicial Committee had no power to enforce obedience to it; and that the monition had not been disobeyed; for the monition could not go beyond the articles, and since the monition he had not done any of the things which had been complained of in the articles, having only elevated the cup and paten to the level of his head, and made genuflexions which were not kneeling, kneeling implying an intentional touching of the ground with the knee; he contended that the monition must be strictly construed, this motion being a criminal proceeding.

*A. J. Stephens*, in replying, was relieved by the Committee, from the necessity of supporting their power of enforcing obedience to the monition issued.

Lord Hatherley, L. C., delivered the judgment of the Judicial Committee.*

In this case a motion has been made calling upon their Lordships to take proceedings in order to enforce the monition which has been served upon the reverend respondent with regard to the execution of a sentence pronounced in the first instance by the Court of Arches. This sentence was in some degree extended and modified by the judgment which this Committee was called upon to pronounce, or rather by the decision which they were called upon, after argument, to recommend as fit to be made by an Order of her Majesty in Council.

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*The Lord Chancellor, the Archbishop of York, Lord Chelmsford, Sir James W. Colvile, Sir Joseph Napier.

The Order provided for several matters; as to three of which only it is now alleged that there has been a breach by the respondent of the monition issued in pursuance of the Order. Those three matters are:—First, that he continues to elevate the cup and paten during the administration of the Holy Communion; secondly, that he continues to kneel or prostrate himself before the consecrated elements during the prayer of consecration; and thirdly, that he continues to use lighted candles on the communion-table at times when such lighted candles are not wanted for the purpose of giving light.

In order to see how far that which is complained of has been a breach of the monition, we must of course in the first instance look to the monition itself. The monition having recited that the respondent was pronounced to have offended against the statutes, laws, constitutions, and canons of the Church of England, by having knelt or prostrated himself before the consecrated elements during the prayer of consecration, and also by having within the said church elevated the cup and paten during the Holy Communion, and also by having used lighted candles on the communion-table, during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of light, proceeds to direct him to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the elements during the prayer of consecration, and also from using, in the said church, lighted candles on the communion-table during the celebration of the Holy Communion, at times when such candles are not wanted for the purpose of giving light.

The evidence which is before their Lordships is addressed to these three several heads. We will deal with them in a different order from that in which they appear in the prayer of the application, and take the use of lighted candles on the communion-table at times when such candles are not wanted for the purpose of giving light, in the first instance, because with reference to that part of the case it appears to their Lordships that the affidavits do not make out the offence charged. In the first place, it appears that the offence charged is not in strict conformity with the monition, because the monition is itself confined to using those candles on the communion-table *during the celebration of the Holy Communion*; and the charge which is made in the motion now before this Committee is, that they were used *on the communion-table at times when they were not wanted for the purpose of giving light*, leaving out the words "*during the time of Holy Communion.*"

Of course it is not competent for their Lordships to proceed beyond the actual monition which has been served upon the respondent. It is that which he has said to have disobeyed, and it is to disobedience of the monition only that their Lordships can address themselves.

It is plain upon the affidavits that the candles have not been lighted during the Holy Communion, for the course taken by the respondent has been this, that the candles are lighted as he says they always have been, and were at the time of the proceedings herein being taken, and are kept buring up to the period of the Holy Communion, and then immediately before the commencement of the Holy Communion they are extinguished.

There is no doubt, therefore, in this case, of a literal compliance with the terms of the monition. The candles are not lighted during the period of the Holy Communion. They are lighted, indeed, when there is no necessity for their being lighted for the purpose of giving light, but they are extinguished before the Holy Communion; therefore the compliance with the terms of the monition has been literal and complete, and not, in that sense, evasive, for the respondent was limited to a particular time, in reference to the candles; and whatever one may feel as to the course of the reverend respondent, looking to the spirit of the monition, of course the monition could not go beyond the matters that were charged: the offence charged was one which he has abstained from; and in this respect, therefore, their Lordships are clear that the prayer of this motion cannot be complied with.

The next charge is that he continues to elevate the cup and paten during the administration of the Holy Communion; and, with reference to this matter, their Lordships feel that the case is placed in a position that is eminently unsatisfactory. On a former occasion the sentence of the judge in the court below was approved with reference to this particular subject-matter; therefore, that sentence is the sentence to which recourse must be had by their Lordships when interpreting the monition, which cannot, of course, proceed further than the sentence itself. The sentence in the court below was thus worded: the respondent was ordered "to abstain for the future from the elevation of the cup and paten during the ministration of the Holy Communion, and also from the use of incense and from the mixing of water with the wine during the administration of the Holy Communion, as pleaded in the articles."

Their Lordships think that the words "as pleaded in the articles" must be applied to those several offences which were charged in the passage just quoted—namely, the elevation of the cup and paten, also the use of incense, and the mixing of water with wine; and their Lordships are thrown back, therefore to the articles to see what it was that was there pleaded, and they find this state of circumstances. Originally the third article pleaded that there was an elevation of the cup and paten beyond what was necessary for the purpose of complying with the terms of the rubric, which directs that at a particular part of the prayer of consecration, when the sacred elements are dealt with, the paten shall be taken into the hands, and at another part that the cup shall be taken into the hand or hands (for there is some little variation in the two parts of the rubric itself) of the officiating minister. That would have been, as it appears to all their Lordships, a charge which would have raised a distinct and definite issue, whether the elevation of the paten or the elevation of the cup were or were not a *bonâ fide* raising it so far only as is necessary for anything to be raised—that is, to be taken from the table; or whether or not there was some ulterior purpose—that is to say, an act of elevation wholly distinct from and going beyond, what was necessary for the mere purpose of taking the paten and cup into the hands of the officiating minister.

But the words "*and otherwise*" were also inserted in the same third article in a part which rendered it very difficult to attach any definite sense to them. Those words are so vague that the learned judge before whom the case first came, Dr. Lushington, conceived that he could not admit the article in that form, and that the words introduced such a degree of vagueness as to render it improper to call upon the respondent to answer the charge in its then shape, and therefore the learned judge said that the article must be reformed.

In the reforming of that article, those who reformed it appear to have gone beyond anything that was required by the decision of the learned judge in the course of the argument upon the admission of the articles. They not merely struck out these words, "and otherwise," but they also materially varied the language by describing definitely in the reformed article the act which had been performed—namely, that it was an elevation of the elements "*above the head of the respondent.*"

The article then became confined to that particular mode of elevation, instead of being a charge of elevation beyond what was necessary for the proper compliance with the rubric; and, therefore, when the sentence of the judge, which directs that he shall abstain for the future from the elevation "as pleaded in the articles," is considered, it appears to their Lordships that they are necessarily confined to that particular charge which is there contained, and that particular mode of elevation which is there complained of.

We have been thus particular in going through all the circumstances of this case, which is left, as it appears to their Lordships, in a very unsatisfactory position, because it is most desirable, and their Lordships are all of opinion that it should be distinctly understood that they give no sanction whatever to a notion that any elevation whatever of the elements, as distinguished from the mere act of removing them from the table and taking them into the hand of the minister is sanctioned by law. It is not necessary for their Lordships to say more (but most undoubtedly less we cannot say) than that we feel nothing has taken place in the course of this cause that can possibly justify a conclusion that any elevation whatever, as distinguished from the raising from the table, is proper or is sanctioned. All that their Lordships can say upon the present occasion is, that the point has never yet been in these proceedings raised, that a particular and definite mode of elevation only has been averred and complained of, and with that particular and definite mode of elevation we have nothing further to do, because it is conceded on all sides that such particular mode has been departed from.

It is not for us to say how far the letter to which the respondent himself has referred, and in a part of which he says that the simple compliance with the rubric—namely, taking the cup and the paten into his hands, would be sufficient for the purpose of satisfying a certain portion of his parishioners as regards the elevation of the elements, may or may not have misled the judges who had this case before them.

They say that the matter complained of having been discontinued, had not been complained of—that is, by the articles, and we have felt it to be right and proper to say that nothing we are now determining, can therefore be pleaded hereafter as a justification for any mode of elevation which is to be distinguished from the mere act of removing the elements from the table, and taking them into the hands of the minister.

Inasmuch, then, as the reverend respondent has said upon oath, and it is not now contravened, that his course of procedure has only been that which he says he adopted at the time of the first hearing of the matter, owing to the complaint made of the higher elevation spoken of in the articles, their Lordships think they cannot in that state of circumstances say that he has thereby committed a breach of the monition which has been served upon him.

The third matter which has been complained of is as follows: and as to this matter their Lordships think the case is open to very different considerations:—

The respondent was admonished "not to kneel or prostrate himself before the consecrated elements during the prayer of consecration;" and without going through the affidavits, the exact state of circumstances may be taken to be as they appear upon the affidavits made by the respondent himself, and by Mr. Walker, the gentleman who was present on the several occasions referred to in the motion. The affidavits in support of the motion stated distinctly acts of prostration and of kneeling during the period of the prayer of consecration. Into the details of those affidavits it is unnecessary to enter, because in the affidavit of the respondent there is this which seems to set the case in a very clear light as far as the facts are concerned. The respondent says:—"I did not on either of the days or times mentioned in the affidavits on which this motion is founded, nor have I ever since the service of the said monition on me, prostrated myself or knelt on steps leading to the communion table, or elsewhere, when celebrating the Holy Communion during any part of the consecration prayer. I admit that it is my practice during the prayer of consecration when celebrating the Holy Communion,"—the time, therefore, is exactly fixed to which the monition would apply—"and whilst standing before the holy table, reverently to bend one knee at certain parts of the said prayer, and occasionally in so doing my knee momentarily touches the ground, but such touching of the ground is no part of the act of reverence intended by me. Whether my knee may have thus momentarily touched the ground on either of the days mentioned in the said affidavits on which I am stated to be the celebrating priest, I am, of course, unable to say." Mr. Walker is a little bolder upon that point, because he says this—he was present on these days,—"I say that the respondent did not prostrate himself or kneel upon the steps leading to the communion table or elsewhere at any time during the prayer of consecration on the 18th day of

July and on the 14th day of November, 1869, as mentioned in the affidavits; and to the best of my belief, he did not touch the ground with either of his knees at all during that time on the occasions on which the respondent is accused of doing so." Then he further says this: "And having regard to the positions of the celebrating and assisting priests during the consecration prayer, as well as to the length and nature of their dress, I do not believe that it is possible for any person in the body of the church to say whether the respondent did kneel or not."

Therefore, the case as stated is this, Mr. Mackonochie, being enjoined against kneeling during this prayer, admits a gesture which he contends is not kneeling, but he admits a bowing of his knee, a bowing of it to an extent which occasions it at times momentarily to touch the ground, a bowing of it to an extent which renders it impossible (according to Mr. Walker's affidavit) for anybody to see whether he is or is not kneeling—that is the distinct statement in the affidavits—viz., that nobody could see whether he is kneeling or not.

First of all their Lordships would consider the literal question which is before them, whether there has been even a literal compliance with the monition in this act of Mr. Makonochie. Their Lordships are all of opinion that there has not been even a literal compliance; and that bowing the knee in the manner which he has described is kneeling: and that it is not necessary that a person should touch the ground in order to perform such an act of reverence as will constitute kneeling. Of course there may be such a bowing of the knee as would amount to kneeling in the sense of the monition, but Mr. Mackonochie very properly says that he takes no advantage of any suggestion of that sort—there may be an accidental bowing of the knee, arising from fatigue or otherwise; but here is a knee bent for the purpose of reverence and in such a manner that those who behold cannot tell whether or not what Mr. Mackonochie and Mr. Walker call kneeling—that is, touching the ground with the knee, has been arrived at, and indeed Mr. Mackonochie says that at certain times his knee has momentarily touched the ground. This seems to their Lordships to be literally kneeling.

But the case must be put much higher than that, because neither this tribunal nor any tribunal will suffer its orders to be tampered with by mere evasion; and a mere evasion it would be, to allow a person when ordered not to kneel (*the whole gist and purport of the order, as I shall presently show, being the kneeling by way of reverence*) to say, "I did all that I could do towards so kneeling; I bowed my knee; I nearly touched the ground with it—I did not quite touch the ground, but I did it in such a manner that all my congregation, all who were attending and seeing that which I did, could not possibly tell whether I were kneeling in that sense or not." It would be intolerable to allow any order to be trifled with in such a manner as must be implied if their Lordships were to give place for a moment to any such argument on the part of Mr. Mackonochie as that this was a compliance with the order.

Now, with reference to this particular matter of kneeling, it is one, undoubtedly, of very great importance as regards the judgment which has been pronounced, and the occasion of that judgment. We cannot do better, with reference to this part of the subject than call attention to the purport and intent of the Book of Common Prayer, when prescribing what is to be done, and in omitting to prescribe that which it does not intend to be done. For that purpose I will refer to the judgment which was pronounced by Lord Cairns, as the judgment of the Judicial Committee on the former occasion. His Lordship thus expresses himself, in page 7 of that judgment: "Their Lordships are of opinion that it is not open to a minister of the Church, or even to their Lordships, in advising her Majesty, as the highest ecclesiastical tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the rubric, between those which are important and those which appear to be trivial. The object of a statute of uniformity is, as its preamble expresses, to produce an 'universal agreement in the public worship of Almighty God'—an object which would be wholly frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, or add to, or alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell*, and their Lordships are disposed entirely to adhere to it: 'In the performance of the services, rites, and ceremonies ordered by the Prayer-book, the directions contained in it must be strictly observed; no omission and no addition can be permitted." And then upon this very subject-matter his Lordship furtner proceeds to say.—"There would indeed be no difficulty in showing that the posture of the celebrating minister during all the parts of the communion service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer-book at and after the Reformation. The various stages of the service are, as has already been shown, fenced and guarded by directions of the most minute kind as to standing and kneeling—the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe that whereas in the first Prayer-book of King Edward VI., there was contained at the end a rubric in these words:—'As touching kneeling, crossing, holding-up of hands, knocking upon the breast, and other gestures, they may be used or left as every man's devotion serveth, without blame,'—this rubric was in the second Prayer-book of Edward VI., and in all the subsequent Prayer-books omitted."

We may further add an observation as to the extreme care which is taken in the Prayer-book to guard all persons who might feel a scruple with reference to kneeling at the reception of the Holy Communion from any inference that might thereby be raised in their minds of a nature contrary to that which was intended by the Prayer-book itself to be expressed, namely, any intention of adoration of the holy elements. This is most particularly and carefully guarded against, and the reason for such kneeling is explained, and said to be, "for a signification of our humble and grateful acknowledgment of the benefit of Christ, therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the Holy Communion as might otherwise ensue." Then it is explained:—"Yet lest the same kneeling should by any persons, either out of ignorance or infirmity, or out of malice or obstinacy, be misconstructed and depraved, it is hereby declared, that thereby no adoration is intended, or ought to be done, either unto the sacramental bread and wine there bodily received, or unto any corporal presence of Christ's natural flesh and blood. For the sacramental bread and wine, remain still in their very natural substances, and therefore may not be adored; for that were idolatry, to be abhorred of all faithful christians."

And again, carefully does our Church provide in her 28th Article against any such adoration as we have spoken of by this declaration—"The sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

Now that being so, and it being of the utmost importance that for the purposes of common prayer such union should be preserved as is essential to the happiness and comfort of all who are joining in this most holy ordinance; what can be a greater offence than the offence of either by addition or omission occasioning trouble or confusion in the minds of those who are invited to join in common prayer, and in one common act of reverence? Acts of reverence, where necessary, are enjoined; and the use of additional acts of reverence, where they are not enjoined, is, according to the judgment which has been pronounced in this very matter, a thing prohibited.

If, therefore, the reverend respondent, in performing his own special act of reverence, does it in such a manner that no one can tell whether he is not doing the very thing which he is prohibited from doing, and has performed that special act of reverence at a time when there is no direction in the Book of Common Prayer for that performance, he certainly does that which militates, in every possible view of the case, both in letter and spirit, against the monition which he has received, and the reasoning which occasioned that monition to be issued.

Whether or not Mr. Mackonochie can reconcile it with his view of what is right, that a judgment of this kind should be so narrowly scrutinized, that every possible limit should be placed upon it, and that, notwithstanding the reasons which are assigned for it—namely, the desire of promoting uniformity in common worship, it should be, as far as possible, evaded, it is not for their Lordships to say. There may be some who feel great grief and sorrow at any act which may appear to be at variance with the common charity and love that should induce us at all times when assembled for worship, and most especially this highest and holiest act of worship, to be as far as possible of one mind, so that then at least our unity be not disturbed.

But what one is justified in saying, as regards the act which is now complained of as a breach of the monition, is this, that it is not possible, happily, to reconcile with the administration of our law in its narrowest sense, any mere evasion of that which the law sanctions, of that which the law has ordered, by an authority which binds this reverend gentleman, as it binds every subject of the realm, to strict obedience. That obedience may be rendered grudgingly, if so it must be; it may be rendered in a manner which I am sure the reverend gentleman would not tolerate on the part of any of his flock, if it were a question of obedience to a higher power; it may be rendered, therefore, strictly within the limits which are exactly prescribed by the monition, but that monition may not be evaded. A mere literal compliance is not all that even the law requires; the compliance must not be literal in a sense which is but evasive.

I will not, in the name of their Lordships, say more upon what I confess presses upon me individually very strongly, the narrowness of obedience shown by the course taken, as to keeping the candles lighted until the very moment when they are forbidden, and then extinguishing them, and as to the elevation of the elements to something which, even on the affidavits themselves, appears to me to be more than necessary for simply taking the cup and paten into the hands of the officiating clergyman, since we have been obliged to hold that these acts were, nevertheless, in literal compliance with the monition having reference to the articles.

But here, in this matter of the kneeling, their Lordships find that there is, first, not even a literal compliance with the order; and secondly, if, upon any strained interpretation of the word "kneeling" (for strained as it appears to their Lordships it would be), they could arrive at the conclusion that it did not preclude the act of bowing one knee so low that it must at times touch the ground, and in a manner which cannot possibly be distinguished from kneeling by those who witness the act; still, if it was a representation of the forbidden act, as nearly as the party charged dared to represent it, and in such a guise as to convey to all at a distance the impression that the act of kneeling was really performed, that would be a species of evasion of the order which a court of justice would find it right and due to the maintenance of its own force and vigour to visit as being itself a breach of the order which had been made.

For these reasons it has seemed to their Lordships (and it is the opinion of us all) that there has been a clear breach of this special monition.

Their Lordships next take into consideration what is proper and right to be done. They did not hear Mr. Stephens upon the question as to whether or not this tribunal has the means of enforcing its orders. Happily it has been supplied (and I say "happily," because it would be in vain to establish a tribunal which has no power to enforce its orders) with abundant means for that purpose by the statutes which have been passed in that behalf; but into the examination of those means, and the different modes that might be adopted for that purpose, we are not, for the reason I am presently going to mention, about to enter. In declining to take any more severe step than that of compelling Mr. Mackonochie to pay the costs of this discussion, their Lordships have had to consider the affidavit which was last made by him, and to which they have been desirous to give the most favourable construction and allowance; and in that affidavit Mr. Mackonochie very properly says that he never, intentionally or advisedly, in any respect, disobeyed the monition, or sanctioned any practice contrary to its provisions. I confess I think, as I have already intimated, that Mr. Mackonochie takes an extremely narrow view of that which the word "obedience" ordinarily implies, when he says that he has endeavoured to obey this order; but he does say that which, in a sense, for the purpose of clearing his contempt, he may have a right to claim the benefit of, that he never intentionally or advisedly, in any respect disobeyed the monition.

He now, we hope, will learn that mere literal compliance in a merely evasive manner will not suffice. Literal compliance with regard to the actual limits of the order is, of course, all that he is held to in law; for an obedience to the spirit of the order we can only trust to his own feelings and his own conscience. And when he thus tells us that it has not been, and is not his desire wilfully to disobey the law, or to disregard its monition, their Lordships think that they are bound, upon this first occasion of the matter being brought before them of any non-compliance with the order, to allow Mr. Mackonochie the benefit of that affidavit; and they do not think it necessary, on the present occasion, to do more, after expressing their opinion judicially than the monition has been disobeyed with reference to kneeling during the prayer of consecration, that to mark their disapprobation of such a course of proceeding by directing that he should pay the costs of the present application.

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## UNITED STATES REPORTS.

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### SUPREME JUDICIAL COURT OF MAINE.

### Geo. W. Prentiss v. Elisha W. Shaw et al.

(*Continued from page* 44.)

Kent, J.—The case, as presented to the jury under the rulings, was, in substance and effect, one where a default had been entered and an inquisition of damages had been allowed before a jury. The jury had no discretion allowed to them, except as to the amount of damages to be inserted in a verdict for the plaintiff. The main question is whether the directions given by the judge to the jury to govern them in the assessment of damages were correct.

The plaintiff claimed damages for several distinct matters, and asked that the jury should found their verdict on these principles, viz.:—

1. The actual injury to his person and the detention and imprisonment.

2. The injury to his feelings, the indignity and public exposure and contumely.

3. Punitive or exemplary damages in the nature of punishment, and as a warning to others not to offend in like manner.

The judge very unequivocally instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty, and that the only question for them was the amount of damages,—that they were bound to give damages at all events for the injuries to the plaintiff's person, and for detention to the full extent of said damages; that they could not consider the testimony put in by defendants in mitigation of such actual damages, but must give a verdict for matters named under the 1st head to the full amount proved without diminution, on account of any matters of provocation, or in extenuation.

The judge further instructed the jury that they might consider the testimony put in by defendants under the 2nd and 3rd heads, above stated, in mitigation of any damages they might find the plaintiff had sustained under either or both of said grounds. These rulings present the question whether the evidence objected to was admissible for the special purpose to which it was confined. It was not in the case generally, but its consideration and application was restricted to the special grounds of damages set up beyond what may properly be termed the actual damages. It was entirely excluded as a justification, or as mitigating in any degree the actual damages.

The distinctive points of the rulings which perhaps distinguish them from some cases in the reports, and some doctrines in the text-books, are, first, that they exclude entirely this species of evidence in mitigation of actual damages,—and, secondly, that they admit it in mitigation of damages, claimed on the other grounds of injury to the feelings, indignity, and punitive damages, although the evidence related to matters which did not transpire at the instant of the assault, but on the same day, and manifestly connected directly with the infliction of the injury complained of.

It is unquestionable that many authorities can be found which seem to negative the proposition that acts or words of provocation, except those done or uttered at the moment, or immediately connected in time with the infliction of the injury, can be given in evidence in mitigation of damages. But most of these cases seem to be predicated upon the idea of mitigation of the positive, visible damages,—those damages to which the party would be entitled on account of the actual injury to his person or his property.

It is important to settle, as well as we can, the general principle which lies at the foundation of the law applicable to damages, occasioned by the illegal acts of the defendant. We understand that rule to be this—a party shall recover, as a pecuniary recompense, the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. But, in the application of this general principle, there has been great diversity in the decisions, and in the doctrines to be found in the text-books touching the point of mitigation or extenuation.

In reference to injuries to the person, it was soon seen that this literal and limited rule, if applied inexorably, would fail to do justice. The case is at once suggested, where an assault and battery is shown to have been wanton, unprovoked, and grossly insulting; inflicted clearly for the purpose of disgracing the recipient, and at such a time or place as would give publicity to the act, and yet the actual injury to the person very slight, or hardly appreciable. Shall the law, in such a case of wanton insult and injury, give only the damages to the face or the person, as testified to by a surgeon?

On the other hand, a case is suggested, where the injury to the person was severe, a broken limb or grievous wounds, or permanent or partial disability, and yet the party suffering had been guilty of gross abuse, provoking the assault by insulting language or false accusations, or most offensive libels upon the defendant or his family, or had outraged the community in which he lived, by a series of acts or declarations which justly aroused and kept alive the indignation, which at last found vent in the infliction of some personal indignity, accompanied by force and violence, which resulted in the serious manner above stated. What is the rule as to such damages, applied to the aggravations in the one case, and the mitigations in the other?

If we take the case of such an assault, which has been provoked by words or acts at the time of the trespass, and so immediately connected therewith that all authorities would agree in admitting the evidence in mitigation, the precise question then is, for what purpose can it be used, and what damages can it mitigate?

All agree that these facts cannot be a legal justification, and be used in bar of the action. The plaintiff is undoubtedly entitled to a verdict, with damages. It is said these facts may be used to mitigate the damages. But what damages? If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated—that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act? Admit that the defendant was provoked, insulted, irritated, and justly indignant at the acts or language of the plaintiff. If those provocations did not reach the point of a legal justification of the assault, then, so far as the question arises for which party the verdict shall be given, they are immaterial, and out of the case. The assault was wholly legal or wholly illegal. There can be no such thing as apportioning the guilt; making the act half legal and half illegal. It is not one of the class of cases where the suffering party contributed to the injury, and thereby lost his right of action. The contribution, to work that effect, must be co-operation in the doing of the act itself, which is complained of,—*i. e.*, the assault and battery; or whatever the alleged specific act may be.

If then the act is confessedly an illegal one, and unjustified in law, why must not the defendant answer for and pay the actual damages to the person? On what principle of law can he be exonerated?

In the case before us the presiding judge took this view. He made a distinction which has not often been attended to, between a recovery for the actual personal damage and loss of time and other direct injuries, and a recovery for other damages based on injury to the feelings, indignity, insults, and the like, and also on the claim for punitive damages.

Is there not such a distinction in law and common sense? Take the simple case of the meeting of two men in a public street. One addresses the other with opprobrious and insulting language, calling him a thief or a liar. The other, at the moment, naturally excited to almost uncontrollable anger, strikes a blow which breaks the arm of his antagonist. The law says the words were no legal justification for the blow. It was therefore a trespass and a wrong. What damages shall be awarded? Can they be more or less, according to the provocation on one side or the natural anger on the other? There is the broken arm, neither more nor less, with the pain and suffering and expense of cure, and the loss of time, all which are open and appreciable, and are the direct and immediate consequences of the legal wrong. If the law holds, as it does, sternly and unwaveringly, that the words are no excuse or justification, why should it "keep the word of promise to the ear but break it to the hope," by allowing a jury to evade the law, whilst in form keeping it by a verdict for nominal damages, which is in effect one in favor of the defendant? Why not say rather that the provocation might be shown in defence of the action, and that if the plaintiff morally deserved to suffer the injury by reason of his language, that should be a legal excuse? It seems to be a legal anomaly to say,—true, it is an undefended, naked trespass and wrong, but no real damages or recompense shall be given. It is giving the benefit of a justification to what the law expressly says is no justification. The restriction of the rule to the provocation given at the time of the assault, does not obviate the objection that it is against a well-settled principle which gives real and substantial redress for every unjustified trespass. Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, in the case before stated, must not the defendant be held to pay the full value of the horse thus rendered useless? Or in case of trespass on land, can the actual damage be mitigated by showing that it was provoked by unfriendly or unneighborly words? Or in case of a damage at sea, could an intentional and unnecessary collision be mitigated, so far as the actual injury was in question, by proving that the navigator was insulted and irritated by taunting and exciting language from the deck of the injured vessel?

But there is no doubt that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show on one side aggravation, and on the other, mitigation of the damages claimed. Verdicts for heavy damages have been sustained where the actual injury to the person was very slight or merely constructive, and other verdicts for merely nominal damages have been confirmed where the actual injuries were shown to have been serious. In the first class of such cases the plaintiff has not been restricted to proof of the injury to the person, but has been allowed to show the circumstances attending the act, and to have damages for the insult, indignity, injury to his feelings, and for the wanton malice and unprovoked malignity of the deed. And it is now settled, certainly in this state, that he may be allowed, in addition, exemplary damages in the way of punishment or warning to the transgressor and others.

Now this opens a wide field for uncertain or speculative damages for matters not tangible or susceptible of accurate estimation, but based upon principles and considerations different from those which determine the actual injuries as before described. These are such as lie patent, and require only a calculation of time lost, pain suffered, or the value of a permanently injured limb, or the like. But when the injury to the feelings, the insult, the mortification, the wounded pride, or, to sum up all in one word, the indignity, are pressed as grounds for pecuniary indemnity, superadded to the claim for punitive and exemplary damages, they evidently and necessarily require a consideration of all the facts in any way clearly and fairly connected with the trespass, and bearing upon the motives, provocations, and conduct of both parties in the controversy, which has culminated in an assault by one upon the other. How otherwise can a jury fairly estimate what should be awarded by way of punishment, or as a reasonable satisfaction for injured feelings? These damages, as our law now stands, are made up of injuries partly private and partly public in their nature. If evidence of this nature, admitted to enhance the actual damages to the person, may be given, why should not the same kind of evidence be given by way of mitigation of damages claimed on such grounds?

If the plaintiff restricts himself distinctly to the single claim for the actual damages to his person, and the direct, tangible results therefrom, and expressly waives all claim beyond, it would seem that the defendant should be limited to matters strictly in defence or justification of his act, as in other cases of trespass. But if, as in this case, he claims beyond this, for injured feelings and for punishment, the question arises (which is the main question made by the plaintiff), what is the limit of the evidence which may be admitted in mitigation or extenuation? It is not denied that some evidence of this nature is admissible. The precise question is whether it is to be confined to what transpired at the time of, or in immediate connection with the act. If a party claims damages not merely for the naked assault, but for his wounded feelings, and seeks to inflame them by showing that he had been publicly insulted by opprobrious language used with the evident intent to degrade him in the eyes of his fellow-citizens, may not the defendant be allowed to show that the complainant had himself been guilty of using like words, or by his conduct and by insults and provocations had really been the cause of the assault? The plaintiff may have been passive and silent at the moment of the assault, whilst the defendant was violent and denunciatory, and, if no facts can be shown beyond those transpiring at that meeting, the plaintiff would present a case, apparently calling for exemplary damages, whilst, if the whole truth was brought out, the defendant would appear the least in fault, so far as regards provocation.

And so, if the plaintiff claims for damages of this nature, for an assault, not by a personal enemy, but by those whose indignation had been aroused in matters of a general and public nature, may not all damages, beyond those actually suffered in his person, be modified or affected by evidence of his acts or declarations, calculated to arouse a just indignation and disgust? Why should the man who has intentionally and grossly outraged decency, or aroused indignation by his violation of common humanity, be allowed to recover for his injured feelings, and the public degradation to which he has been subjected? Or rather, why should not a jury be allowed to know all the facts, directly connected with the act, although not transpiring at the moment, and from them determine, whether any, and if any, what damages should be allowed beyond the actual injury to the person or property? If facts beyond the act are to be allowed to aggravate, why should not like facts be allowed to mitigate this class of damages? Where, for instance, a man had been guilty of frequent, indecent exposures of his person in public streets, accompanied by obscene language and gross insults to females, and had persisted in such a course, until a body of his townsmen, indignant and outraged, seized him and inflicted punishment, and carried him away and confined him for a day, or other like proceedings; and for this assault and battery and imprisonment an action is brought and a claim set up for recompense for injured feelings, indignity and for punitive damages. At the trial, he proves these acts,—rough handling, and degrading treatment, and personal imprisonment, and makes out a case of apparently inexcusable interference with his liberty and his person, and his sense of self-respect. The defendants cannot show that he did or said anything at the time of the arrest. But are they to be precluded from showing anything in mitigation of such a claim? The law is fully vindicated when it gives such a man his full, actual damages. When he asks for more, he opens a new ground for his opponent, who may well say,—you have no fair claim for damages on this ground, for your own conduct and language aroused the indignation which led to the acts complained of.

There is an instinct, or, if not quite that, a dictate of common sense, which it is neither wise, or hardly possible for the law to disregard,—that a man should not have pecuniary recompense for injured feelings or public degradation, when he has himself outraged the feelings of another, or so conducted as justly to excite public odium by open contempt of the decencies of life. The old legal requirement, that he that asks for redress "must come into court with clean hands," at once occurs to us. The law will protect the hand from actual violence upon it, although it may sadly need ablution, but beyond this will require "a show of hands" before it will adjudge damages for an alleged defilement.

The ruling of the judge, in this case, was peremptory and unqualified, that the evidence made out no legal defence, and that the verdict must be for the plaintiff "to the full extent of the damages sustained by the injuries to the plaintiff's person, and for detention."

If, after this ruling, the defendant had consented to a default, and the case had come before a judge to determine the damages, and the same claim for cumulative and exemplary damages had been made and pressed, would any judge have excluded, in the hearing before him, the evidence offered in this case? If he had, how could he determine the degrees of aggravation or extenuation, or come to any satisfactory conclusion on the matter of damages? As before said, the jury in this case were in the same condition, after the ruling, as a judge would have been after default.

When we consider the nature and the grounds of this claim for exemplary or punitive damages, it is difficult to see why the evidence of provocation or mitigation, if allowed at all, should be restricted to the time of the overt act. What happened then may, and generally would, give a very partial and insufficient view of all the circumstances which in truth belong to the matter in question, and serve to aggravate or diminish the injury to the feelings, or the malice of the act. Every one sees this at a glance.

We think it will be found, on a careful examination of the cases, that where this rule, limiting the evidence to what transpired at the moment, has been enforced, the claim was to diminish the damages for the actual corporeal injury and loss of time, and no distinction was made between those and exemplary damages. The reasoning to be found in this class of cases is very similar to that found in the decisions at common law, where the degree of guilt is lessened, and a different and distinct offence, of a less degree, is found by reason of proof of sudden and provoked anger; as where a homicide is reduced from murder to manslaughter. But, in such trials, these matters of provocation and sudden anger are introduced, not to mitigate a crime found or admitted, but are strictly matters in defence, and modify or give character to the act, in determining what crime has been in fact committed, and are used for that purpose. In such case it becomes important to know whether the act was the result of sudden passion, or whether there had been time for the passions to cool. But in a civil action for trespass the liability of the party for actual damages does not depend upon the intent or state of mind of the trespasser. He may be liable, if his act was unlawful, although he did not intend to injure any one, and had no anger or ill-will towards the party whose person or property was affected by his illegal act. It is not the motive, or the feelings under which the legal wrong is committed, which determines the character of the act, or the amount of the actual damages resulting from it. It cannot be excused, if legally unjustified, by proof of sudden passion, or the absence of malice or wrong intent.

The analogy, if any, between civil actions and criminal prosecutions, is to be found in the determination of the extent of punishment in the one, and the amount of exemplary or cumulative damages in the other. Although in the trial of criminal cases the evidence may be limited to the time of the occurrence, yet every judge is aware that, in fixing upon the sentence to be awarded, he does not hesitate to hear evidence or statements as to facts and acts and declarations made or done anterior to such time—in order to ascertain, as well as he can, the mitigating or aggravating circumstances connected with the offence. So, in determining the amount of damages in a civil suit, beyond the tangible, as before explained—when there is no question as to the fact that a trespass has been committed, a limitation of the examination into what transpired at the moment would seem to fall far short of what reason and common sense would prescribe. It seems hardly just to require any tribunal to act and determine such questions, and to award damages in the nature of punishment, and withhold from it all knowledge of the facts which may fairly be said to give the moral character of the act, and the actual guilt of the respondent.

We are aware that great care must be taken to confine the examination to such matters as are clearly and directly connected with the acts, or give color or character to it. Mere evidence of general bad character,—or unpopularity, or of acts or declarations of ancient date, or not clearly and really part and parcel of the matter in question, must be excluded. But time is not of the essence of the principle, but fairly established direct connection, as cause or effect. It is impossible to accurately define the limits, so as to reach every case. But there can be no greater difficulty in the application of this than of many other rules of law.

In the case at bar, the evidence was limited to the transactions of the day on which the assault was committed, and very evidently was of matters connected directly with the acts done. If it had been excluded, after the evidence on the part of the plaintiff had been heard, how could the jury have properly or understandingly determined what punitive damages should be given in vindication of outraged law, or for the indignity and injury to the feelings? They had a right to know, and the defendants had a right to place before them the true relations of the parties, and to show how far the act was wanton, malicious, vindictive, or unprovoked, or how far extenuated by the conduct, declarations, or provocations of the complaining party.

On the whole, after a full consideration of the case, and the cases, we think that the rulings of the judge were not erroneous, but give the rules on this subject which are practical, and in accordance with common sense and the general principles of the law.

*Exceptions overruled.*

Cutting, Dickerson, Barrows, and Tapley, JJ., concurred.

(Note by Editors American Law Register)

This is one of that class of cases, where there existed at the time it occurred, and even at the present time, to some extent, there exists, a degree of unfairness, in judgment and opinion, which renders it extremely difficult to say anything which will be kindly received, or candidly weighed. But we feel compelled to say, that the facts of this case, placed beside the verdict of $6.46, certainly do indicate a substantial failure of the suit, if not of justice. The jury must have treated the evidence given in mitigation of damages, as a substantial justification of the assault, battery, and false imprisonment, with all its incidents of humiliation and outrage. The verdict very clearly manifests an opinion in the mind of the court and jury, that the plaintiff was more in fault than the defendants—in short, that the conduct of the plaintiff was reprehensible, and that of the defendants excusable—and that, therefore, it was proper for the court to place its stigma upon the action. This is not said, indeed, in so many words, but it is fairly implied.

This is a result to which courts of justice should never come, except in the most unquestionable cases, where there is no pretence of anything more than a nominal breach of the law, and where the action is therefore clearly vexatious. And it is especially unbecoming for courts to fall into this view, out of respect for, or sympathy with, or dread of, an intensified partisan public opinion. It is the duty and the business of courts, to hold the scales of justice evenly and firmly between the most embittered partisans of contending factions in the state, when such become suitors before them.

We might better have no courts, than to have them echo the varying surges of an ever-changing and baseless public sentiment. In a case like the present, it would be far better to have the court instruct the jury, in so many words, that the plaintiff's disregard of the common courtesies and decencies of life, justified the defendants in inflicting such punishment upon him, as would teach him not to repeat the offence, and to conduct with more circumspection in the future, than to have left the case to the jury, in such a slipshod way, as to bring about the same result exactly, but without any technical violation of the rules of law. And we must say, it seems to us that the charge of the court below, and the opinion of the full court, although clearly not so intended, must have operated in that direction.

Possibly some may claim, that upon a nice construction, there was no error in law, and all agree that courts cannot be expected always to control the waywardness or the prejudices of juries. But this is generally urged, where courts desire to throw their own responsibility upon the irresponsibility of the jury. And it seems to us the charge to the jury, in this case, afforded the jury an excellent opportunity to punish the plaintiff, and at the same time to compliment the defendants for taking the plaintiff in hand, and applying the rules of Lynch law to him, in the summary mode they did. This was all very well, provided it were the business of courts to administer Lynch law, or to moderate the strictness of the existing law. But as that is not the fact, but the contrary, it seems a peculiarly unfortunate distinction which the court have attempted to make in this case, between compensatory and exemplary damages, and to allow of the mitigation of one and not of the other.

If there be, in fact, any such distinction in the law, it should certainly be differently stated from what it seems to have been in the trial of this case, or it would be very likely to be misapplied by the jury, as it certainly was here.

The error in the charge seems to be in treating "the injury to the plaintiff's feelings, the indignity and the public exposure," as forming no part of the *actual damages* in the action. Nothing could be further from the truth; since these things not only constitute a portion of the actual damages, but the principal portion. It is scarcely possible to conceive any proposition more unjust or unreasonable—not to say absurd—than to suppose that in a transaction like that, through which the plaintiff was dragged by the defendants, that the actual "injury to his person and his detention" embraced all for which he was entitled to compensation under the head of actual damages.

It is not probable, indeed, that the plaintiff was of that delicate organization, that he would be likely to suffer any irreparable damage merely from the insult and indignity, for if so, he could not have said what he did. But there are many persons who, from similar treatment, might have been ruined for life; and the rule of law is the same in all such cases. And there is no case, except the present, so far as we have noticed, which attempts to discriminate between corporeal and external injuries, and those which affect the sensibilities. These latter, are those which form the chief ingredient of damages in this class of actions. If these latter are to be excluded from consideration, or justified by *public sentiment*, there might better come an end of all pretence of the administration of justice. It is the direct and sure mode of encouraging a resort to force for remedy and redress.

We know that some very able writers, and among them the late Professor Greenleaf (2 Evidence, s. 253 and n. *et seq.*), contend for the rule, that in no case are exemplary or punitive damages to be given, but that in all cases they should be confined to making *compensation* to the plaintiff. But no writer, or judge, to our knowledge, has ever before attempted to limit the actual damages to which the plaintiff was in all cases entitled *by way of compensation*, to loss of time and injury to the person, in cases of trespass and false imprisonment. Mr. Sedgwick (Dam. 665, n. 1), says, that "all *rules*, or rather definite principles of damages in civil actions, must be referred either to compensation or punishment." No one, we suppose, would for a moment deny that the plaintiff, in an action of this character, is entitled to recover damages for "the injury to his feelings, the indignity, and the public exposure;" and it would seem to be equally improbable, that any one should hold, that such damages were in the nature of punishment to the defendant, and only recoverable under that head.

The truth unquestionably is, in the present case, that the court have mistaken the application of their own rule, and thus, as it seems to us, have presented the whole case in a most unfortunate aspect—very much in that of an excuse and an apology, if not a full justification of Lynch law, than which nothing could have been further from its intention.

We hope no one will be simple enough to suppose that we feel any other than the most unqualified disgust and contempt for such sentiments as were expressed by the plaintiff, on the occurrence of the most disgraceful, as well as the most unfortunate event, which has ever occurred in our past history. The only possible mode of accounting for such folly, in speech, is that folly on one side naturally leads to counter folly upon the other, and despotic public opinion naturally provokes foolish words. But we trust it is not needful to inform the profession, and especially the courts, in this country, that the high privilege of free speech is not created, or maintained, for the exclusive, or the chief benefit of wise and discreet men. They will do very well without any such protection. But it is intended for the protection of every class of the most ranting fools, and the vilest blackguards, and the most infamous blasphemers, except as they are liable to some restraint by the firm and wise administrators of the criminal and civil law of the land. These are the only men who require protection at the hands of the administrators of the law; and when we allow ourselves to be cheated with the delusion that the simple and degraded, or the offensive and coarse-grained, do not deserve the highest protection of the law, we approach a point of timeserving, which is but one degree removed from actual corruption, of which we already begin to hear charges, in some quarters, but we trust wholly without foundation.

We regret, in this case, the affirmation of the principles of the charge in the court below by a court of such high character, although done in a mode, and for reasons, which show the high dignity and purity of the tribunal, and do also show, as it appears to us, that an unfortunate misapplication of the very principle upon which the case is decided, must have occurred in the court below. We know the learning and ability of the court from which the decision comes; and we are always proud to welcome its members among our most esteemed friends; but we cannot shut our eyes to the fact, that the substantial damages in this action were blinked out of sight, and disregarded by the jury, upon grounds which are flagrantly in violation of the leading doctrine of the decision, viz., that actual and compensatory damages cannot be denied upon any ground of provocation short of an actual justification of the assault, battery, and false imprisonment, which was not attempted in this action.

The testimony offered and received in mitigation of damages in this action, might well enough have been received, upon the question of punitive or exemplary damages, but it was not of a very satisfactory character even upon that head. The only portion of it which seems to afford any just apology for the flagrant misconduct of the defendants, was the stupid blunder of the provost-marshal in directing the plaintiff to be "detained." This had some fair tendency to vindicate the good faith of the defendants in arresting the plaintiff. But what can be said of their after-conduct in forcibly carrying the plaintiff three miles, and dragging him before a town meeting, and sentencing him to take an oath to support the Constitution of the United States? They might, with the same propriety, have sentenced him to be hanged, or burned to death. And if they had done so and carried the sentence into execution, and been indicted for murder, they should, so far as we can see, upon the principle of this decision, have been permitted to show the plaintiff's provoking bravado talk in mitigation of punishment—or possibly to reduce the verdict from murder to manslaughter.

It does not seem to us that such evidence should have been permitted to go to the jury, upon either the first or second point made in the plaintiff's request to charge, and not upon the third, except so far as it tended to show that the defendants acted under a misapprehension of the law, and in good faith; for punitive or exemplary damages are not given with any reference to the plaintiff's misconduct, within the limits of the law, but solely on account of the malice and wanton misconduct of the defendants, and to admonish them, and others in like case, not to repeat the misconduct. Is there anything in the plaintiff's folly and bravado, naturally calculated to induce the defendants to believe they had any legal right to deal with him in the manner they did? Was not then the charge of the court, and the result of the trial, directly calculated to encourage such abuses of right, such flagrant breaches of the law? Was not the conduct of the defendants malicious, wanton, and intentionally insulting and abusive? Can there be more than one opinion on these subjects? And was not the charge in the court below, the verdict of the jury, and the overruling of the exceptions, all calculated to encourage such conduct, and to discourage such actions? If so, can we fairly expect parties suffering like indignities to appeal to the tribunals for redress? And will not the result of such experiences, in courts of justice, sooner or later, end in a resort to force in all such cases? These are plain questions, but they are fundamental to the very existence of free states and private liberty, both of person and speech.

I. F. R.

—*American Law Register.*

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER AND OCTOBER, 1869.

*(Continued from Vol. VI. page 54.)*

Action—*See* Money Had and Received.

Administration—*See* Executor and Administrator.

Admiralty.

A vessel with her anchor down, but not actually holden by and under the control of it, is "under way," within the meaning of the Admiralty Regulations, 1858.—*The Esk*, L. R. 2 A. & E. 350.

*See* Collision.

Agent—*See* Principal and Agent.

Assignees—*See* Costs, 1.

Assignment—*See* Equitable Assignment.

Assumpsit—*See* Money Had and Received.

Bailment—*See* Negligence, 1.

Bank—*See* Bankruptcy, 4; Negligence, 1.

Bankruptcy.

1. In July, A. voluntarily gave to B., his principal creditor, a bill of sale of all his goods, &c, with a power to enter and sell if, &c. In October, B. entered and sold the goods for less than his debt. In November, A. was adjudged a bankrupt on his own petition, and the creditors' assignee sued B. for the conversion of said goods, and also for money had and received. *Held*, that as there could be no relation to an act of bankruptcy previous to the bankrupt's own petition, neither count could be maintained.—*Marks* v. *Feldman*, L. R. 4 Q. B. 481.

2. J. deposited bills of lading for cotton and coffee with G., as collateral security for G.'s acceptances. J. afterwards authorized G. to sell the cotton and coffee and receive the pro-

ceeds. Later, J. became bankrupt. The cotton was sold before J.'s bankruptcy; the coffee did not arrive till afterwards, and after the acceptances had been paid, but was then sold, J. being in G.'s debt. *Held*, a case of mutual credits. (Kelly, C. B., *dissentiente* as to the coffee.) (Judgment of Common Pleas *reversed*. Exch. Ch.)—*Astley* v. *Gurney*, L. R. 4 C. P. 714.

3. A. sued B., C., and D. on a joint debt. The defendants pleaded a set-off. (12 & 13 Vict. c. 106, s. 171.) A. replied that before plea D. had become bankrupt. *Held*, a good replication.—*New Quebrada Co.* v. *Carr*, L. R. 4 C. P. 651.

4. Although a bankrupt's shares in a bank have been declared forfeited by the bank for a debt due to it, the bank may prove for the full amount of its debt; and the forfeiture, if questioned, must be tried in an independent proceeding.—*Ex parte Rippon*, L. R. 4 Ch. 639.

5. After a company was ordered to be wound up, some of its debts were bought by contributories for much less than the sums actually due. *Held*, that the full amount of the debts might be proved for.—*In re Humber Ironworks Co.*, L. R. 8 Eq. 122.

*See* Costs, 1; Fixture, 1; Interest.

Benefit Society.

Among rules, mostly those of a Friendly Society, was this: "Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council shall be entitled to the sum of 15*s*. per week." An officer of the society testified that members would not be allowed to go where there were strikes, if they could prevent them, and that money would be granted to send them another way. *Held* (*per* Cockburn, C.J., & Mellor, J.; Hannen & Hayes, JJ., *dissentientibus*), that, taking the rules with the evidence, one of the purposes of this society was to support strikes, and was illegal as in restraint of trade.—*Farrer* v. *Close*, L. R. 4 Q. B. 602.

Bill of Lading—*See* Sale.

Bills and Notes.

In an action against M., as an indorser of a bill of Exchange, brought by a *bona fide* holder for value, the jury was instructed that "if the defendant's signature was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict."—*Held*, that the direction was right.—*Foster* v. *MacKinnon*, L. R. 4 C. P. 704.

*See* Cheque.

Cheque.

1. If there are not effects in a bank on which a cheque is drawn sufficient for its payment when presented, and it is presented at the time when the drawer has reason to expect it will be, and he has no ground to expect that it will be paid, he is not entitled to notice of dishonor; although at the time of drawing it, but before the agreed time of presentment, there were sufficient effects.—*Carew* v. *Duckworth*, L. R. 4 Ex. 313.

2. June 4, A. drew a cheque on H. & Co. at Falmouth, in favor of defendant, who transferred it to the plaintiffs, his bankers at Truro, on the 5th. On the same day the plaintiffs sent the cheque to B. & Co., their agents in London, who received and presented it on the 6th to H. & Co.'s agents in London. On the same day H. & Co.'s agents forwarded the cheque to H. & Co., who received it on the 7th. On that day H. & Co.'s agents in London failed. On the 7th B. & Co. wrote to H. & Co. to return the cheque or to pay it. On the 8th H. & Co. wrote, declining to do either, and stopped payment on the 9th. The plaintiffs gave defendant notice of dishonor on the 9th. *Held*, that defendant was liable. The cheque was presented, and notice of dishonor was given, in due time.—*Prideaux* v. *Criddle*, L. R. 4 Q. B. 455.

*See* Principal and Agent.

Club—*See* Company, 2.

Codicil.

At a testator's death there was found what purported to be a codicil to his last will and testament, which referred only to the dispositions of a deed of gift. Before the deed he had executed several wills, none of which were found. *Held*, that the codicil should be admitted to proof.—*Black* v. *Jobling*, L. R. 1 P. & D. 685.

*See* Will, 2.

Collision.

Two steamships, the Q. and the R., each under the charge of a compulsory pilot, came into collision in the Thames. The Q. was solely to blame, and after the collision she rendered no assistance to the R., and showed no excuse for having failed to do so. *Held*, that the owners of the Q. were liable, although she had a pilot on board. The master was "the person in charge" of the Q. at the time under 25 & 26 Vic. c. 63, s. 33.—*The Queen*, L. R. 2 A. & E. 354.

**Company.**

1. A company, incorporated for the working of collieries, contracted with A. for the erection of a pumping engine and machinery for use in the colliery, and paid him part of the price. *Held*, that the company could maintain an action against A. for breach of the contract, though the contract was not under seal. (Exch. Ch.)—*South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617; s. c. L. R. 3 C. P. 463; 3 Am. L. Rev. 268.

2. A mutual insurance association was formed, but not incorporated. By their rules the members were to severally, not jointly or in partnership, each in proportion to the amount of his own insurance, insure the ships of the other members. The affairs of the association were to be managed by a committee; and all moneys of the association were to be kept in their name at a banker's. *Held*, that outside creditors could only look to those who gave the orders, not to the association of the members as such.—*In re London Marine Insurance Association*, L. R. 8 Eq. 176.

*See* Bankruptcy, 4, 5; Benefit Society; Interest.

**Concealment**—*See* Insurance, 2.

**Condition**—*See* Insurance, 3; Landlord and Tenant.

**Conflict of Laws**—*See* Foreign Government; Domicile; Insurance; Stamp, 2; Will, 2.

**Conspiracy**—*See* Parliament.

**Construction of Instruments**—*See* Benefit Society; Deed; Equitable Assignment; Guarantee; Insurance, 2-4; Legacy, 1, 2; Statute; Trust; Will, 5.

**Contract.**

A party caused an agreement for the purchase of a warehouse to be made out in the name of his nephew, paid part of the purchase-money, and induced his nephew to sign on the faith of his representation that he would give him the warehouse, and pay the balance due. He then died testate, without having provided for such payment. *Held*, that it must be made out of his assets.—*Skidmore* v. *Bradford*, L. R. 8 Eq. 134.

*See* Company; Foreign Government; Covenant; Guarantee; Insurance; Novation; Pleading; Specific Performance; Stamp, 1.

**Contributory**—*See* Bankruptcy, 5.

**Corporation**—*See* Company, 1.

**Costs.**

1. The court will not require security for costs to be given by a plaintiff who sues as the assignee of a bankrupt for the benefit of the estate, although he is in insolvent circumstances.—*Denston* v. *Ashton*, L. R. 4 Q. B. 590.

2. Nor by two executors, one of whom is out of the jurisdiction, and the other insolvent. *Sykes* v. *Sykes*, L. R. 4 C. P. 645.

**Covenant.**

1. A., a brewer, sold land to B., who covenanted with him that A. his heirs and assigns should have the exclusive right of supplying beer to any public house to be erected on the land, but A. did not covenant to supply it. C. bought part of the land with notice of the covenant, built a public house, and supplied it with his own beer. A filed a bill to restrain C., alleging that A. had always been ready to supply good beer at a fair price. A demurrer was overruled. The covenant was not void.—*Catt* v. *Tourle*, L. R. 4 Ch. 654.

2. A lessee having covenanted to use the demised premises for the sale of spirits, the lessor covenanted not to build or keep any house for such sale within half a mile of said premises. *Held*, that an assignee of the lease could not sue the lessor on his covenant.—*Thomas* v. *Hayward*, L. R. 4 Ex. 311.

*See* Landlord and Tenant.

**Curtesy.**

A husband may have curtesy in an equitable fee given to the separate use of his wife.—*Appleton* v. *Rowley*, L. R. 8 Eq. 139.

**Custom**—*See* Mortgage, 3.

**Damages**—*See* Vendor and Purchaser of Real Estate.

**Debtor and Creditor**—*See* Novation.

**Deed.**

The grant of a warren of conies in B., "and all that lodge thereupon built, called," &c., which warren extends itself "in and over the wastes of B.," with a reservation of rent "for" the same, does not pass an estate in the soil of said wastes.—*Earl Beauchamp* v. *Winn*, L. R. 4 Ch. 562.

*See* Trust.

**Demand**—*See* Cheque, 2.

**Desertion.**

A wife having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce, in which she failed. The husband never thereafter sought to resume cohabitation, nor did the wife, and it was not resumed. *Held*, that these facts did not constitute desertion by the husband.—*Fitzgerald* v. *Fitzgerald*, L. R. 1 P. & D. 694.

**Deviation**—*See* Insurance, 2.

Devise—*See* Will, 5.

Discovery.

A defendant, in a suit for infringement of a patent, in order to prove that there was no novelty in the plaintiff's patent, interrogated the plaintiff as to the inventions described in the specifications of previous patents, and asked him to show in what respect they differed from his. The plaintiff declined to answer, on the ground that these were not questions of fact, and that they related to the plaintiff's case. *Held*, that he must answer. A defendant may ask any questions tending to destroy the plaintiff's claim.

An exception bad in part, is not necessarily wholly bad.—*Hoffman* v. *Postill*, L. R. 4 Ch. 673.

Divorce—*See* Desertion.

Domicile.

When a domicile of choice is abandoned, the domicile of origin revives and continues until a second domicile of choice is acquired.—*Udny* v. *Udny*, L. R. 1 H. L. Sc. 441.

Election—*See* Perpetuity, 2.

Equitable Assignment.

A., having wheat ex vessel M., in the hands of a factor for sale, borrowed 500*l.* from B., and gave B. his acceptance at two months, describing the consideration as "value received in wheat ex M.;" and it was orally agreed to renew the bill from time to time until A. should receive from the factor the proceeds of the wheat. *Held*, that this did not amount to an equitable assignment of the fund in the hands of the factor.—*Field* v. *Megaw*, L. R. 4 C. P. 660.

Equitable Conversion—*See* Tenancy in Common.

Equitable Plea—*See* Pleading.

Equity Pleading and Practice—*See* Discovery; Specific Performance, 1.

Evidence—*See* Stamp, 2.

Exception—*See* Discovery.

Executor and Administrator—*See* Costs, 2; Money Had and Received; Stamp, 2; Will, 3.

Fixture.

1. A lessee of rolling mills made an equitable mortgage of the same, and afterwards became bankrupt. On a case stated between the mortgagees and the assignees, *held*, (1) That duplicate iron rods, which had been fitted to the machine and used, were fixtures, and passed to the mortgagees; (2) so were straightening plates embedded in the floor; (3) but rolls which had not yet been fitted to the machine; and (4) weighing machines which were placed in bricked holes, the weighing plate being level with the ground, but which were not fixed to the brickwork, were not fixtures, and passed to the assignees.—*In re Richards*, L. R. 4 Ch. 630.

2. A steam-engine and boiler, annexed to the freehold for the more convenient use of them, and not to improve the inheritance, and capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold (Exch. Ch.)—*Climie* v. *Wood*, L. R. 4 Ex. 328; s. c. L. R. 3 Ex. 257; 3 Am. L. Rev. 271.

Foreign Government.

By a convention between the government of Peru and a Peruvian company, all guano to be shipped from Peru to England and Ireland was to be consigned to the company, which was to sell the same, and hold the net proceeds at the disposal of said government. Said government afterwards negotiated a loan in England, hypothecating for the same all the guano to be shipped as above, and agreeing that out of the proceeds of said guano a certain sum should be applied half-yearly in redemption of the loan bonds. Bondholders sued to enforce the application of the proceeds in England to redemption as agreed. The Peruvian government was made a party, but did not appear. *Held*, that the court had no jurisdiction.

The loan was governed by the law of Peru.

The above redemption was to be made by paying off at par bonds to be drawn by lot when the bonds should be above par, and by purchasing at the market price when the bonds should be at or below par. The government cancelled bonds which had been given up to it in exchange for bonds of a subsequent loan, to the stipulated amount at the price at which the subsequent loan was contracted, being a higher price than that of the bonds of the first loan, as quoted on the London Stock Exchange. *Held*, a compliance with the contract.—*Smith* v. *Weguelin*, L. R. 8 Eq. 199.

Forfeiture—*See* Landlord and Tenant.

Fraud—*See* Bills and Notes; Contract; Fraudulent Conveyance; Wife's Equity.

Fraudulent Conveyance.

A debtor, at a time when he knew that a writ of sequestration would be issued against him, mortgaged all his property to trustees for five of his creditors. By the deed the debtor was to remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced, his possession was to cease. A writ of sequestration was subsequently issued. *Held*, that the deed was not void under 13 Eliz. c. 5, as against the sequestrators.—*Alton* v. *Harrison*, L. R. 4 Ch. 622.

Frauds, Statute of—*See* Specific Performance, 1.

Friendly Society—*See* Benefit Society.

Guarantee.

1. The defendant gave to the plaintiff, a cattle dealer, this guarantee: "50*l.* I, J. M., of, &c., will be answerable for 50*l.* sterling that W. Y., of, &c., butcher, may buy of Mr. J. H., of, &c." It appeared from the circumstances under which the guarantee was given, that the parties contemplated a continuing supply of stock to W. Y. in his trade as a butcher. *Held*, a continuing guarantee to the extent of 50*l.*—*Heffield* v. *Meadows*, L. R. 4 C. P. 595.

2. The following: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1000*l.*, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months;" is a continuing guarantee.—*Laurie* v. *Scholefield*, L. R. 4 C. P. 622.

Heir and Personal Representative—*See* Tenancy in Common.

Husband and Wife—*See* Curtesy; Desertion; Money Had and Received; Revocation of Will; Wife's Equity.

Illegal Contract—*See* Covenant, 1.

Injunction—*See* Covenant, 1.

Insolvency—*See* Costs; Interest.

Insurance.

1. Trustees under a will agreed to advance to A. a sum to which his wife would be entitled at twenty-one, if B. would be surety for repayment of the sum if A.'s wife should die before that age. B. consented, on condition that the wife's life was insured. The sum was advanced, and A. effected an insurance in his wife's name on her own life. *Held*, that as A. was interested in the policy, and his name was not inserted therein, it was void under 14 Geo. III. c. 48, s. 2.—*Evans* v. *Bignold*, L. R. 4 Q. B. 622.

2. Plaintiff obtained insurance from defendant on bone-ash on board his vessel "cleared from A. and port or ports of loading in the province of B.," to port, &c., knowing that the vessel was to load at L., a geographical port in the province of B., but not informing the defendant of the fact. Had the latter known it, he would have charged a higher premium; but underwriters did not then know that L. was a port of loading. Vessels loading at L. had to return to and to clear from A. The vessel and cargo were lost in so returning. *Held*, (1) that L. was a port of loading within the policy; (2) that there was no concealment; (3) that there was no deviation. *Harrower* v. *Hutchinson*, L. R. 4 Q. B. 523.

3. Defendants in London insured the plaintiffs upon gold "in the ship called the *Dutchman*," for a certain voyage, against, *inter alia*, perils of the seas, with the usual suing and laboring clause. The ship was at the time English, but afterwards became a Russian ship, without the knowledge of either plaintiffs or defendants. The ship was wrecked in Turkish waters, and the gold was taken in charge by the Russian consul. By the judgment of his court, which had jurisdiction, the gold was ordered to pay a much larger sum, by way of contribution, than it would have been had the ship remained English. An appeal might have been, but was not, taken, and the sum was paid in order to get back the gold. In an action to recover a part of the sum so paid from the insurers, *held*, (1) that as there was no express warranty that the ship should continue English, none could be implied; (2) that whether the Russian judgment was according to law or not, the compulsory payment was a direct consequence of the wreck, and so was a loss by perils of the seas; (3) that the plaintiffs were not bound to have appealed.—*Dent* v. *Smith*, L. R. 4 Q. B. 414.

4. Insurers agreed that if the plaintiff should be compelled to pay "as damages" for running down any other ship any sum, &c., they would repay him a certain proportion of such sum. The policy also contained the usual suing and laboring clause. Plaintiff successfully defended the action against him for running down another ship. *Held*, that he could not recover the costs of defence from the insurers (Exch. Ch.)—*Xenos* v. *Fox*, L. R. 4 C. P. 665; s. c. L. R. 3 C. P. 630; 3 Am. L. Rev. 701.

*See* Company, 2; Stamp, 1.

Interest.

In the winding up of an insolvent company, dividends are to be paid on the debts as they stand at the date of the winding up. Subsequent interest is to be allowed only in case of a surplus, when dividends will be applied first to interest then due, and then to principal.—*Warrant Finance Co.'s Case*, L. R. 4 Ch. 643.

*See* Legacy, 3; Stamp, 2.

Interrogatory—*See* Discovery.

## REVIEWS.

Harrison's Common Law Procedure Act, 2nd Ed. Copp, Clark & Co., Toronto.

Part IV. has been issued, containing sections 205 to 280, inclusive, of the Common Law Procedure Act. This brings the author into the heaviest part of his work, but does not we imagine, give us as yet half of the entire work. We anxiously look for its early completion, which will give us the index, that most necessary key to every book, and especially to a work of Practice as compendious and complete as this. We doubt not that the energy and experience of the learned gentleman who has so successfully brought us so far, will as efficiently conclude his most admirable work. Few who have not had experience, can know the delays and difficulties in passing a work of this kind through the press, and the time necessarily taken up is vastly increased by the number of cases referred to, as these have to be carefully verified.

It is wonderful to notice the careless way in which counsel cite cases, giving the person whose duty it is to verify the cases endless annoyance, at a great waste of time to him and delay in publication. In the work before us we can vouch that this verification is being done with the greatest exactitude, regardless of time and trouble.

The American Law Review. January, 1870. Boston: Little, Brown & Co. Subscription price $5 per annun. Quarterly.

The second number of Vol. iv. of this well-conducted quarterly is before us. The articles are, I. Proximate and Remote Cause—rather metaphysical than practical: II. Warranty of Seaworthiness in Time Policies: III. The Law of Insanity: IV. Lord Campbell's Lives of Lyndhurst and Brougham.

The article on the Law of Insanity, which, were it not for our limited space, we should like to reproduce for our readers, is thus introduced:—

"When Lord Hale laid down his famous rule of law that some kinds of insanity furnish no excuse for crime, he unquestionably reflected the most advanced opinions on the subject, both of lawyers and physicians. For more than one hundred years its correctness passed unchallenged; and no person on trial for a criminal act was acquitted on the ground of insanity, whose disease had not entirely deprived him of reason and reduced him to the condition of an idiot or a wild beast. Science could enter no protest against the rule, for the materials necessary to give such a protest any support were not in existence. Medical men may sometimes have had a vague apprehension that all was not right, when a convict proclaimed the grossest delusions from the gibbet; but they were never properly shocked by the barbarity of such scenes. Coincident with the signal reforms in the treatment of the insane and the increased attention to the study of insanity, which marked the close of the last century, the suspicion began to be entertained by lawyers that the rule excluded from its protection many classes of the insane that were justly entitled to it. But they never, to this day, have decided that insanity, in whatever shape it may appear, is necessarily an excuse for crime. The advanced step which they took was to regard certain forms of what is now called partial insanity, as having this legal effect; but precisely which they were, was a point not so easily settled. The exact question was, what mark, quality, or attribute of insanity should make it an adequate excuse for crime, and this led to definition of insanity and tests of responsibility. At one time, the question seemed to be satisfactorily answered by saying that it was a delusion, without which the patient could not be considered so insane as to be irresponsible for any criminal act. It was not too long, however, before it began to be suspected that this was giving too large a sweep to the excuse, and then its application was restricted by various limitations. From time to time other tests were offered which, though intended to meet a present exigency, were fondly believed to cover every possible requirement. One was that if the patient retained his knowledge of right and wrong, he continued to be accountable for his acts. Another was that if he knew the act to be contrary to the laws of God and man, he could not avail himself of the plea of insanity. Again, it was said that if he showed contrivance and forethought in regard to the criminal act, he was sufficiently sane to be accountable therefor. It would be a waste of time to mention all the rules of law on this subject, which the ingenuity of courts has devised, and which, one after another have been found too narrow for general application. But they will continue to be offered, and new ones no better to be made, so long as false theories of insanity prevail in the community, and the indubitable facts of science are treated as matters of speculation and fancy; and no improvement will be made, so long as it is believed in the high places of justice that the effect of insanity on the thoughts and feelings, the appetites and impulses, may be thorougly discerned by a hasty examination and the slightest acquaintance with the mental phenomena."

The writer then proceeds to give the following passage from the charge of a learned American judge (Edmonds), to the jury, in the case of *The People* v. *Kleim*, as illustrative of what he argues is the more enlightened doctrine of the present day:—

> "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. If some controlling disease was in truth the acting power within him, which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible. In order then to constitute a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commit the act he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he has not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent and is not a punishable for criminal acts."

We notice in the *Bench & Bar*, an article on the same subject, which will also repay perusal. The subject has an ephemeral interest, over and above that attaching to it from its intrinsic importance, from a divorce case in the English courts lately brought prominently before the public. Whilst, however, admitting that humanity requires that all care should be exercised for the protection of those suffering under the dispensations of Providence, the public must be guarded against the abuse to which the *humane* doctrine is open.

Of the specimen of petty spite in high places, exhibited by Lord Campbell in his Lives of Lyndhurst and Brougham, we have almost had enough. But, as a final shot at the author, and as an interesting sketch of the salient points of character of the great men now dead, that Lord Campbell unsuccessfully attempted to malign in his own peculiar style, the article in this review is most interesting, and we hope on a future occasion to find room for it.

We have the usual Digest of English and American Cases, Book Notices, A List of Law Books published in England and America since October, 1869, and a summary of events.

We heartily commend this Review to our readers, and advise them to subscribe to it at once; the price is a mere nothing for the interesting and instructive matter always to be found in it.

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The Albany Law Journal: Weekly. Weed, Parsons & Co., Publishers, Albany, N. Y. $5 00 per annum.

This is a new weekly Law Publication of much promise. It does not purport to be a collection of miscellaneous reports of cases, of which there are enough and to spare in the United States, but is more of a Magazine of matter interesting to the profession, culled from various sources, and containing leading articles on important topics. We have now received several numbers, and they evince good taste and much literary attainment.

A very interesting sketch of "Law and Lawyers in literature," by Mr. Irving Browne, runs through the numbers that have hitherto come to hand. With many of the incidents and extracts we are of course all more or less familiar, but many are new to the general reader, and may here be found collected and arranged in an accessible shape.

We notice also an address to law students by Hon. J. W. Edmonds, containing some excellent advice; the Administration of Justice, by the same author; on the Study of Forensic eloquence; Law of Arrest without Warrant, &c. We anticipate good success for this publication.

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Bench and Bar. Chicago, January, 1870.

This number contains discussions as to whether the Law deals unfairly with Questions of Insanity; the Right of Arrest &c.

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The American Law Register. Philadelphia.

The leading article is as to how the Goodwill is to be dealt with in Partnerships. The usual selections of cases.

## DIARY FOR APRIL.

1. Fri.. Local School Supt. term of office begins.
3. SUN. *5th Sunday in Lent.*
4. Mon. County Court (York) Term begins.
7. Thur. Local Treasurers to return arrears of taxes due to County Treasurer.
9. Sat.. County Court Term ends.
10. SUN. *Palm Sunday.*
15. Fri.. *Good Friday.*
17. SUN. *Easter Sunday.*
18. Mon. *Easter Monday.*
23. Sat.. *St. George.*
24. SUN. *1st Sunday after Easter.*
25. Mon. *St. Mark.*
30. Sat... Articles, &c., to be left with Secretary Law Society, Last Day for L. C. to ret. occupied lands to Co, Tr. Grammar and Common School Fund to be apportioned. Co. Treas to make up books and enter arrears.

THE

Canada Law Journal.

APRIL, 1870.

## RECENT MUNICIPAL CASES.

The usual crop of applications to unseat municipal councillors of various kinds and degrees is now nearly gathered in. There have not been many, but those of any general interest which we propose to notice are the following:—

*Reg. ex rel. Ford* v. *McRae*, which appears in another column, speaks for itself. The others are not as yet reported.

*Reg. ex rel. Gibb* v. *White* was a novel application, to test the right of an Indian, as such, to hold office as a Municipal Councillor. Mr. White, whose election was sought to be set aside, is the son of a Chief of the Wyandott or Huron Indians of Anderdon. For many years past he has been engaged in trade, and is the owner in fee simple of patented lands (apart from the Indian Reserve, to a share of which he is also entitled) on which he lives, the value being beyond the necessary qualification. It was contested that as he was not an "enfranchised" Indian under the provisions of the statutes in that behalf he had not become entitled to all the rights and privileges of other British subjects. It was however held that the provisions as to enfranchisement related only to the property acquired from that set apart for the tribe, and that there is no law in existence in this country which prevents an Indian, who is otherwise qualified, from holding any municipal office. We cannot regret that such is the law, and we should have been much surprised to have found it otherwise. It would certainly be a reproach to us if a descendant of the former owners of the soil—our allies and friends in many a hard fight for this very country—one who, in the opinion of his white neighbors, is of sufficient intelligence and position so to command their respect as to be elected in preference to a white man—should be debarred from holding the position to which he has been chosen.

Amongst the papers filed on shewing cause was a copy of the treaty between Sir Wm. Johnson and the Huron Indians of Detroit, dated 18th July, 1764, the original of which is in the possession of Mr. White's brother, and was produced on the argument. It may be interesting to many of our readers to know its contents:—

"Articles of Peace, Friendship and Alliance, concluded by Sir William Johnson, Baronet, his Majesty's sole Agent and Superintendent of Indian Affairs for the Northern District of North America, and Colonel of the Six United Nations, &c., on behalf of his Britannic Majesty, with the Huron Indians of the Detroit.

### Article 1st.

Sir William Johnson, Bart., doth agree with the Hurons that a firm and absolute peace shall take place from the date of these presents between the English and them, and that they be admitted into the chain of Friendship and Alliance with his Britannic Majesty; to which end the Hurons are immediately to stop any attempts towards hostilities which might be meditated by any of their people, and they engage never to attempt disturbing the public tranquility hereafter, or to conceal such attempts of any others, but will use their utmost endeavours to preserve inviolable the peace they hereby enter into, and so hand it down to posterity.

### Article 2nd.

That any English who may be prisoners or deserters, and any Negroes, Panis, or other slaves amongst the Hurons, who are British property, shall be delivered up within one month to the Cammandant of the Detroit, and that the Hurons use all possible endeavours to get those who are in the hands of the neighboring nations; engaging never to entertain any deserters, fugitives, or slaves, but should any such fly to them for protection, they are to deliver them up to the next commanding officer.

### Article 3rd.

That they will not from henceforth maintain any friendship with any of his Majesty's enemies or maintain any intercourse with those who may promote war and troubles, but will oppose their designs and treat them as common enemies; and that they will never listen to any idle stories of any White man or Indian who may spread false reports; but if any matter of grievance arises they are either through the channel of the Commandant of Detroit, or by personal application to Sir William Johnson, to represent their complaints.

### Article 4th.

That they acknowledge his Britannic Majesty's right to all the lands above their village, on both sides the Strait to Lake St. Clair, in as full and ample manner as the same was ever claimed or enjoyed by the French.

### Article 5th.

That they do to the utmost secure the Strait or Passage from Lake Erie to the Detroit, and do use their utmost endeavours to protect the navigation thereof, either with ships or boats, against any attempts of an enemy, as well as defend all persons who may have occasion to go or return frem Detroit by land or water. And lastly, that they do now or at any other time, at the requisition of the Commandant of Detroit, or of any others his Majesty's officers, furnish such a number of their warriors as may appear necessary for the protection thereof or the annoyance of the enemy.

In consequence of the perfect agreement of the Hurons to the foregoing articles, Sir William Johnson doth, by virtue of the powers and authorities to him given by his Majesty, promise and declare that all hostilities on the part of his Majesty against the Hurons shall cease, that past offences shall be forgiven, and that the said Indians shall enjoy all their original rights and privileges, as also be indulged with a free, fair and open trade, agreeable to such regulations as his Majesty shall direct.

Given under my hand and seal at arms, at Niagara, the 18th day of July, 1764.

(Signed) Wm. Johnson.

[L.S.]

The Chiefs of the Hurons have, in testimony of their accordation to the foregoing articles, subscribed the marks of their respective tribes, the whole being first clearly explained to them."

We cannot undertake to give with any correctness the names of the chiefs who signed the; treaty but, aftertheir names appear their *totems*, the first being a tortoise, the second something said by the learned to represent a beaver, the third is the figure of a man, and the fourth another tortoise. It would be somewhat strange that if, after the lapse of more than a century, Her Majesty should call upon the Hurons, in the words of treaty, "to furnish such a number of warriors as may be necessary for the protection [of her subjects] or the annoyance of the enemy." Yet such circumstance is not only not impossible, but has even been contemplated within the past few months.

In *Reg. ex rel. Flater* v. *Vanvelsor*, the objection taken by the relator was to the property qualification of the defendant, who qualified on real estate rated on the roll at $470. It appeared to have been sufficient unless reduced by the amount of a mortgage for a large sum, which however was shewn to have been paid before the election, or unless reduced by the amount due on a *fi. fa.* lands, which was in the sheriff's hands as a lien at the time of the election. It was contended that the defendant had goods sufficient to cover the claim, and therefore, as the goods must have been exhausted first, that there was in reality nothing which could be looked upon as sufficient to reduce the qualification. It was unnecessary to decide this point, though Mr. Dalton, before whom the case came, thought as long as the *fi. fa.* lands was in the sheriff's hands it must be considered as a lien or incumbrance for all purposes; but he raised the point whether liens or charges of that nature could be taken into account at all—and he held that as the statute said nothing about incumbrances, and that they could not be taken into consideration; in fact that if a person appeared to be rated on the roll for a sufficient amount, that alone, so far as his property was concerned, was all that the statute required, even though his equity of redemption or beneficial interest in such property might be worth less than nothing. The point, though nearly approached in another case, was not before, curiously enough, expressly decided.

Another case was that of *Reg. ex rel. McGouverin* v. *Lawler*, which, though not deciding any question of qualification or disqualification is new on a matter of procedure.

The defendants election was not complained of, but the relator sought to unseat him on the ground that he had been convicted of selling liquor without a license, and had thereby under 32 Vic. cap. 32, sec. 17 (Ontario), forfeited his office. It was however held, that the proceedings taken under sections 130 and 131 of the Municipal Act by summons, in the nature of a *quo warranto* summons, were not applicable to such a case as this, whatever the common law remedy might be in such a case; and reference was also made to sections 120, 124 and 125, as affecting the case.

## COUNTY JUDGES' CRIMINAL COURTS.

A writer in the *Law Times* draws attention to the remarks that appeared in this Journal in November last on this subject, and speaks fully of the jurisdiction and procedure of the Courts as we detailed them. This article, which will be found in another place, shews that the conductors of that leading periodical fully comprehend the importance of the "gigantic stride in legislation" in the "remarkable act" referred to. Whilst fully concurring in the views we expressed as to its advantages, they think it advisable to wait till the Act is tested by time and experience before following our example, though at the same time they are bound to admit that it proceeds in the direction of the inevitable tendency, which will eventually give prisoners the option, in England as well as here, of being tried with or without a jury.

## LEGISLATION.

Amongst the Bills before the present Parliament of the Dominion interesting to the lawyer, we notice several affecting Bills and notes; two for the purpose of providing for cases where stamps have not been affixed at the proper time or for the proper amounts, and innocent persons have become liable to penalties. Also, a Bill introduced by the Post-Master-General, intended to "assimilate the law of the several Provinces of the Dominion, as to Bills and Notes." This is a very important measure, and necessary for the convenience of mercantile men and most beneficial for the consolidation of the mutual interests of all concerned. The bill is in a great measure a re-enactment of the law already in force in this Province on the subject.

There are also two bills to amend the law respecting the extradition to the United States of persons charged with crimes committed in that country; a bill to amend section 71 of the Act respecting duties of Justices out of session in relation to summary convictions; a bill to amend section 3 of 32 & 33 Vic. cap. 23, respecting Perjury; and last, but by far the most important of all, is the bill to establish a Supreme Court for the Dominion of Canada. Of this we shall speak hereafter at length. It is of too much moment to be lightly passed over; and from what we hear, it is likely to stand until next session, which will give all an opportunity of discussing its provisions.

## EXTRAORDINARY TRIAL IN CHINA.

A friend in China has sent us a paper, the *Overland China Mail*, published at Hong Kong, containing a report of a case of much interest and instruction to all persons concerned in the administration of criminal justice. During the absence in England of Chief Justice Smale, of the Supreme Court in the British Colony of Hong Kong, four Chinamen, Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen, the master and three of the crew of a junk, where tried, convicted and sentenced to be hung, for the murder of one Mahoney a police officer. This conviction was obtained upon the evidence of three Chinamen, Tung Pak Foo, Lee Akwai, and Lum Asang, who deposed to their presence at the date of the murder; the two latter deposed that they saw the four men and Tung Fak Foo, all armed, land from the Yee Lee junk on Saiwan Bay for Sowkewan; and Tung Pak Foo deposed that he was present participating with the four in the murder, and that he saw the wound which caused the death inflicted by the first prisoner.

The final decision as to their execution was fortunately delayed beyond the usual period, owing to special local circumstances.

On the 4th of November, some respectable Chinese residents in the Colony, being entire strangers to the four convicted men, presented a petition in which they alleged reasons for suspecting that the testimony of all the three witnessess was false, and they made out so strong a case as to induce the Governor in Council to commute the sentence of all four prisoners to penal servitude for life.

Suspicions were subsequently aroused as to the truth of the statements of these witnesses, and they were indicted for perjury, and ultimately convicted before Chief Justice Smale, on the clearest evidence of guilt.

The learned Chief Justice after reciting the facts and shewing the justice of the conviction used the following language in sentencing the the prisoners:—

"Lum Assang and Lee Akwai, you have each been convicted of perjury in swearing on the trial of Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen, that they were landed from Saiwan Bay to near Sowkewan, on the night of the 17th of April last. You knew that they were on a trial for a crime for which you believed that there lives would, on conviction, be forfeited. You have admitted your crime, and you have made reparation as far as you can in the evidence you have repeatedly given; I have considered the excuse made by each of you, that you have each been subjected to imprisonment in the Police Chop, and to the pressure of the influence of the authority of the Water Police there to coerce you into perjury.

The learned counsel, Mr. Hayllar, after your trial, speaking for his client, the prosecutor, whilst he ably argued that all this forms no answer to the charge against you—that it did not exonerate you from legal guilt—admitted in expressive terms that the coercion which, as he said, had been proved, formed a very strong case of coercion as addressed to me in mitigation of punishment, that it formed quite a terrorism affecting your minds when you gave your testimony.

Concurring in all that has been humanely put forward, I must as judge blame you. Although I do not greatly wonder that the vile influences which were exercised prevailed over you, and although others were certainly far greater criminals, I cannot exonerate you from criminality.

I pass on each of you the lightest sentence, which considering all the circumstances of this case I can award.

The sentence of the Court on you, Lum Assang, is that you be imprisoned and kept to hard labor for six calendar months.

The sentence of the Court on you, Lee Akwai, is that you be imprisoned and kept to hard labor for six calendar months.

You, Tung Pak Foo, were defended by counsel who took every possible point and urged every possible topic in your favor. You are without excuse; no influence appears to have been exercised over you, and with great cunning (which all but succeeded), you deposed to facts and circumstances which you knew to be entirely untrue, as was demonstrated by your unsuccessful efforts by coercion and terror to suborn others to sustain your story by perjury. Your character as a person habitually on such terms with pirates as that a mere note from you was sufficient to protect honest trading boats from piracy, was proved on your trial. If you had your full deserts you ought to suffer the severest punishment possible.

The sentence of the Court on you for the crime of which you have been convicted, is that you be kept in penal servitude for seven years.

You, Choy Asam and Tung Pak Foo, have each been convicted of conspiracy, the object of which was in order to gain the Government reward of $500 to accuse in this Court, Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen of the crime of murder.

Neither of you had any excuse for your most wicked conduct.

The sentence on you, Choy Asam, is that you be imprisoned and kept to hard labour for five years.

The sentence on you, Tung Pak Foo, is that for this your crime of conspiracy, you be imprisoned and kept to hard labour for two years. This sentence and imprisonment to commence and take effect from and after the expiration or sooner determination of the sentence of penal servitude to which this Court has already sentenced you.

The result of these protracted trials is that it has been proved that Shek Aluk, Shek Achung, Shek Chung Leen, Shek Qui Leen, are not only "Not Guilty," of the murder of which they were convicted, but that they were innocent—absolutely innocent—indeed, that they are peaceable and honest sailors. Every right minded man must deeply sympathize with them for the mental tortures— worse than bodily tortures —to which they have been subjected in the fear of death—of an ignominious death—aggravated by the feeling that they were innocent.

The Government can, and I hope will largely (it is beyond its power adequately to) compensate these poor men for the wrongs done to them.

I see that Tuk Cheong and some of the other respectable Chinese residents to whose exertions so much praise is due, are present.

No words I can utter can increase the satisfaction which they must feel, that by exerting themselves they have proved the innocence of the four men, and with so good an effect. Every right minded man must feel indebted to them. I trust that the success of their efforts will well satisfy them for the money which they have with right good heart expended to bring together such a mass of conclusive evidence, as has enabled this Court to exercise its most noble function, the elucidation of innocence. These efforts have been well seconded by the very able way in which the facts of the case have been marshalled before the Court. I trust that this success will induce them and other respectable Chinamen to take in uture a more active part in effectually aiding the Government in the suppression of crime and violence, and in securing good order, in which they have as deep an interest as any other persons in this Colony.

Reflecting persons may probably be shocked that four innocent men were so near being executed, and will ask what security there is that the irrevocable penalty of death has not often been inflicted in this Colony on innocent persons. I confess that I shuddered when this question forced itself on me; but on careful reflection, I feel satisfied that there is no just reason for alarm.

A Blue Book published in 1866. Report of the Capital Punishment Commission, gives for three years, 1861-63, fifty-two as the number of executions in England, under fifteen judges, while during the same period thirty men were executed under sentences by one judge in this Colony. I have not the English Returns up to this date, but there have been since 1863, thirty-seven executions in this Colony, which I believe is in a ratio to the executions in England much greater than the proportion was in previous years. It appears that executions in this small Colony have been since 1860 more than half, probably two thirds part, in number of all the executions in all England.

With a responsiblity greater, I believe, than weighs on any other judge administering English Criminal Law, I have ever followed what the Chief Baron Sir Fitzroy Kelly stated in the same Report to be practiced in all English Courts. I have always 'exercised a degree of care, and caution in conduct of trials for life and death—vastly superior to that which formerly prevailed.' These cases confirm my resolution to exercise the like care and caution as long as I may preside in this Court.

I have obtained from Mr. Douglas, the very intelligent and able Superintendent of the Gaol, a return of all cases, 66 in number, which have ended in an execution, since I came in 1861 to this Colony. I find from Mr. Douglass that in nearly every case since he came to the Colony, the criminal has confessed his crime—indeed in every case where I have presided—and I have no reason to suspect that any one innocent man has been executed on the sentence of any judge in this Colony."

## SELECTIONS.

### THE FRENCH BAR.*

At a time like the present, when changes are taking place in the administration of the law, and when, as incident thereto, some changes, the extent of which it is not easy to measure, may take place in the organization of the legal profession in both its branches, the appearance of Mr. Young's book is most opportune.

In reading this most interesting and unpretending work, one cannot help being struck with the great differences which exist between the two professions in our own country and in France. Taken broadly, the ambition of the English barrister is to become a judge; he may have to be satisfied with something far short of that exalted dignity, but at the outset of his professional voyage the Bench is his goal, and "very sea-mark of his utmost sail." Political life, purely as such, with very rare exceptions he does not venture upon. The reason for this is partly due to the fact we have stated, and partly due to other causes, and among others to this, that political life in this country is the profession of the highest in station or the wealthiest in purse. The portfolio of the minister, on the other hand, is the ambition of the French advocate. The Bench in France is not recruited from the Bar, nor does it hold in public estimation that almost sacred place that it does with us; and, further, the social position of the judges is not so high as in this country, nor are the emoluments of the French judges upon the same scale. It is therefore to political life that the advocate in France looks, and in that he centres his hopes.

The work before us, within a compass of some 250 pages contains much varied and interesting information. If we may find fault with so admirable a book, we should say that it was somewhat overlaid with dates and detail. But, as the author terms the volume a *Sketch* of the history of the order of advocates, as well as of the biography of many of the illustrious members of the French Bar, perhaps this was unavoidable. The book travels over a great extent of ground, or rather of time, it speaks of events of great interest and importance, and traces dilligently and lovingly down the stream of five hundred years of history, the course of that great profession, the eloquence and ability of whose members have done such splendid service for France.

That the history of an "order as ancient as the magistracy, as noble as virtue, as necessary as justice," should be interesting is but natural. But the history of the French Bar is something more. It is the history of the courage, the devotion, and the patriotism of many of the foremost men of their country, it is the history of the growth of liberal opinion, of enlightenment, and civilization.

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* An Historical Sketch of the French Bar, from its origin to the present day, with Biographical Notices of some of the principal Advocates of the Nineteenth Century. By Archibald Young (Advocate), Edinburgh. Edmonston & Douglas. 1869.

The profession of advocate in France dates from a very early period, and although existing as a separate order earlier than the reign of Philip the Fair, the reign of that monarch is a very important epoch in the history of the French Bar. Philip made the parliament stationary, which formerly had followed the person of the king, and thus he greatly increased the power and influence of the Parisian Bar.

To a somewhat similar circumstance our own Bar owes perhaps its existence. In this country the 'Bar,' in the sense in which that phrase is commonly understood, cannot be traced further back than the thirteenth century, for it was not until after Magna Charta that the Courts of Law were permanently settled at Westminster, instead of following, as they previously had done, the king's person in his journeys through the country. Speaking generally, the French Bar is a provincial one, scattered over the country, while our own is metropolitan, the system of circuits in this country to a great extent obviating the necessity of barristers settling in different parts of the country.

The growth of business, however, has in England already attracted great numbers of the junior Bar into the provinces, and as unquestionably the present current of our long needed law reforms sets in the direction of centralization as from many centres, the result will be that our own Bar will become to a great extent provincial also. If this be so, we fear the result will be a degradation of the profession, which one would greatly deplore. The circuit system once destroyed, even the imperfect control the mess at present exercises would be destroyed, and all discipline would be at an end.

No one can read a book such as that of Mr. Young's without seeing how vastly the administration of the law, and how greatly its dignity, depend upon the character and conduct of those who are its ministers.

Already changes are at work (to which attention has been publicly drawn) which argue but ill for the maintenance of the traditionary honour and dignity of the profession in this country. It would be well for the Bar (if for once the body would act as their brethren in France have done repeatedly) to consider, in view of changes which must operate upon them, whether it would not be desirable to organize some new and distinct method of discipline throughout the provinces, in forming local bars, with appointed officers, or some system or machinery whereby professional decorum and order may be maintained. With this special evil of provincialism to contend against, and under all the changes and vicissitudes through which France has passed, her advocates appear to have maintained unchanged the traditionary character, dignity, and political power bequeathed them by their Roman forefathers. This is due, we think, to the more perfect organisation of the profession in France, and to its loyalty to itself. In France the status of the Bar, and the conduct of its members, has been considered matter of imperial concern, and the State has, by positive enactment, laid down rules for its guidance.

Laws have been passed from time to time in France, regulating the conduct of the Bar. One law provides that all arguments calculated to injure the opposite party should be spoken courteously, and another forbids the advocate to make any bargain with the party for whom he pleads for a share of the matter in litigation. This latter rule would seem to resemble our own, save that the rules of conduct which obtain at the English Bar are purely consuetudinary, and the disability which the English barrister lies under from enforcing by action the payment of his fees seems to apply also to the French Bar. A subsequent law of Philip the Bold, published in 1274, imposes upon advocates the obligation of swearing that they will only take charge of those causes which they believe to be just, the refusal to take the oath being punished with interdiction. This rule opens up, no doubt, matters which have been subjects of keen controversy, with which we here cannot deal, but we will only say that in our opinion such a rule has only to be made to be practically abrogated. "If an advocate refuses to defend," says Lord Erskine, in his defence of Thomas Paine against the charge of publishing a seditious libel (this was in 1792), "from what *he may think of the charge*, or of the defence, he assumes the character of judge, nay, he assumes it before the hour of judgment."

The conduct of advocates in this country has been subjected to very little legislative interference. But a statute lately in force, and for all we know it may be so yet, passed in the reign of Edward I., A.D. 1275, enacts, "That if any serjeant, counsellor, or others, do any manner of deceit or collusion in the King's Court . . . he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man." And further, in that old book, the "Mirroir des Justices," c. ii., s. 9, it is, among other things, ordained "That every pleader is to be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge, but will fight for his client to the utmost of his ability." This injunction, our Bar we think, fairly carries out. The second and third articles of the French law which we have mentioned treat of the fee of advocates, which were to be proportioned to the importance of the cause and the skill of the pleader. The fee was never to exceed a sum equal to about 27*l.* of our money.

In the year 1291, Philip the Fair confirmed the enactments of Philip the Bold concerning the fees of advocates and the prohibition to receive anything beyond the amount fixed by law. From time to time further regulations were made with respect to the duties of advocates, and it is almost amusing to read the repeated recommendations and injuctions addressed to the advocates to be brief in their pleadings, prolixity having been evidently a fault with the Bar of France at all times in their history. The limitation as to the amount of fees seems soon to have fallen into disuse, as we find that in 1453 the advocates were recommended to be moderate in their fees. One usage, which obtains in England at the present time, namely, the signature of counsel under the fee marked upon their briefs, was the subject-matter of an ordinance in the time of Henry III., and forms the occasion of a memorable incident. The king enjoined the Bar to write with their own hands beneath their signatures the amount of fees they received. The Bar refused to obey the injunction, and in truth resented it as an insult, and to show their determined hostility went in a body to lay-down their functions, declaring that they voluntarily abandoned the profession of advocate rather than obey a law injurious to their honour. Four hundred and seven advocates in all thus solemnly protested against the ordinance. When the Parliament met there were no advocates to plead and justice was at a standstill. In the end the Bar succeeded. This is a very strong instance of the internal discipline of the French Bar, and of loyalty to their order, and affords, perhaps, the first example recorded of a strike. Be this as it may, we doubt if the Bar here would ever act as resolutely or so completely in union.

Our author thus describes what may be termed the organization of the profession.

> "From a pretty early period in its history the Bar of Paris was accustomed to arrange itself by benches, in order that its members might meet and confer more easily. These benches were placed in the great hall of the Palais de Justice or in the adjacent galleries. In 1711, the advocates, formerly divided into eleven benches, were arranged in twelve. The first was composed almost entirely of seniors, and a few seniors were placed at the head of each of the others, after whom came the younger members, according to the date of their admission into the order. This organisation, however, was found to be very imperfect, and in 1780 the fifth bench contained 101 advocates, the seventh nine, and the eighth seven; while the tenth had ninety-five, and the twelfth ten. In 1781, a reform took place, and the order was divided into ten columns, each containing from fifty to sixty advocates. Each column elected two deputies, whose functions lasted for two years, and who might be re-elected. These deputies from the different columns, along with the former presidents of the Bar, constituted the council of the order, elected its presidents, watched over its roll, and maintained its discipline. The advocates were further divided into three classes—listeners (*avocats ecoutants*), pleaders (*avocats plaidants*), and consulting advocates (*avocats consultants*). According to the ancient practice, the young licentiate from the University was presented to the court by one of the seniors of the Bar, and the president administered to him the oath to observe the laws, which he took standing upright, in his gown, with uncovered head, and right hand uplifted; in short, the ceremony of the oath seems to have been very similar to that at present observed at the Scotch Bar. A minute of the taking of the oath was then drawn up and signed by the senior, or, as he was termed in the olden times, the godfather of the young jurist. After taking the oath, the advocate might assume the gown, but he had not yet the right of pleading. He entered upon a period of probation, called *le stage*, which, by a decree of May, 1751, was extended to four years. Upon the lapse of this period, his name was inscribed in the roll of advocates upon the report of one of the chiefs of his bench or column. The pleaders (*avocats plaidants*) were highly respected, and had the right, not only of appearing in the Courts of Parliament, but also in all the inferior judicatories. The mutual exchange of papers was considered one of the courtesies of the profession, and, before pleading, the advocates were in the habit of making extracts from their briefs, containing the facts of the case, and communicating them to the plaintiff's counsel. Pleading and consultation for the poor was one of the established rules of the ancient Bar and every week nine advocates met in order to hold gratuitous consultations on the causes of the poor. The advocates, as at present, spoke with their heads covered, except when they pleaded before the King's Counsel. The consulting advocates—*advocati consiliarii*, as they are termed in the old ordinances—held the highest rank at the Bar. They gave their advice to the pleaders, they regulated the affairs of families, and were entrusted with many matters of the highest moment. They had a bench set apart for them in Parliament, and were entitled to a seat on the *fleur de lis*. The head or president of the French Bar was, and still is termed a *bâtonnier*. This title dates back to the middle of the fourteenth century; but for a long time after that period it was an office of little importance. The name is derived from an ancient usage, according to which the staff (*bâton*) of the banner of St. Nicholas, the patron of the confraternity of advocates, was carried at the head of the order in processions and ceremonies. He who carried it was termed *bâtonnier*. So late as 1602, however, the dean (*doyen*) held the first place at the French Bar, the *bâtonnier* only the second. The latter is mentioned for the first time as the head of the order in 1687; and it is only since July, 1693, that he has had a legal title to be considered the head of the Bar. Formerly, the senior member of the order, by date of inscription on the roll, used to be elected *bâtonnier*. But as the great age of the advocate thus chosen often unfitted him from efficiently discharging the duties of an office requiring watchfulness and tact in no ordinary degree, the order determined to give up th principle of election. The *bâtonnier* is chose for one year only; but since 1830 it has bee usual, at the close of his first term of office, t re-elect him for a second year. The *bâtonni* has the privilege of making his business appointments at his own residence, even with those who

are his seniors at the Bar. The title of dean (*doyen*) belongs to the senior member of the Bar inscribed on the roll; but it confers no other privilege than that arising from seniority. The *bâtonnier*, the former *batonniers*, and the deputies from the columns form a council, which meets in the Advocates' Library, and whose chief object is the preservation of the discipline of the order. The *batonnier* himself adjudicates upon trifling complaints against members of the Bar; but if the matter is of consequence, he reports it to the council. If the suspension of a member, or the erasure of his name from the roll, is to be deliberated on, the *batonnier*, after examining into the matter, reports to the Crown counsel, and their decision is registered. In the most important and serious cases, the court is petitioned to give judgment in terms of the requisitions of the *bâtonnier*, and the conclusions of the Crown counsel. At the expiration of his term of office, the *bâtonnier* makes up the roll of advocates, with the assistance of the former *batonnier* and the deputies, and deposits it in the register before the 9th of May"

(*To be continued.*)

## SLANDER.

Considering the very great importance of the rights of reputation, it is somewhat surprising that there is scarcely any branch of the law which is less generally understood than slander. Though the majority of persons have, at some period in their lives, been the victims of false and injurious reports, yet actions for slander are few and far between. The fact that the decisions are frequently obscure and conflicting, while the procedure for reparation is cumbrous and expensive, may account for the infrequent appearance of this class of cases in our law courts. Our daily experience of unhappiness in families in the higher, loss of trade in the middle, and violence and crime in the lower classes, originating from false and malicious statements, forbids our attributing this reticence from legal process to any other causes. It may, therefore, be interesting to consider somewhat briefly the present state of the law, and the defects therein, that from these considerations we may educe some suggestions for the further protection of the public against—

"The tongue that licks the dust,
But when it safely dares, is prompt to sting."

Slander is an injury for which, by law, an action for damages will lie. Criminal proceedings cannot be taken for mere spoken words, unless they are seditious, blasphemous, grossly immoral, or addressed to a magistrate while in the execution of the duties of his office, or with reference to those duties, or uttered as a challenge to fight a duel, or with an intention to provoke another to send a challenge. To be actionable, the accusation must be wilful, to the damage of another in law or fact, and be made without lawful justification or excuse. Express malice may be implied from the slander itself, and need not be proved. The allegation must be *false;* it must impute an indictable offence, a contagious or infectious disease, or be injurious to the profession or business of the plaintiff, or tend to his disherison. In the first case, not only a punishable offence must be alleged, but it must be such a crime or misdemeanour as incurs corporal punishment. The charging an offence, therefore, merely punishable by a pecuniary penalty, although, in default of payment, imprisonment shonld be prescribed, would not be actionable, the imprisonment not being the primary and immediate punishment.

But the more frequent ground of action is that of *special damage*, as where, by the wrongful act of the defendant, a servant was prevented from procuring a situation, a tradesman lost his custom, or a woman her marriage. It should, however, be borne in mind, that the damage must be the mere natural and direct consequence of the unlawful act.

To the mind of a layman not versed in the nice distinctions of the law, the definition of what is, or what is not slander, is most perplexing. For example, it is not actionable to say, "J. S. is a murderous villain," as this simply implies an inclination; but to say, "J. S. is a murdering villain," would be actionable because it imports a crime committed. To charge another with a crime of which he cannot be guilty, as having killed a person still living, is not actionable, no matter how much the accused may have suffered in reputation therefrom. It is also a matter of difficulty to ascertain what is an infamous punishment.

No one, we think, will be prepared to say that a greater injury can be inflicted by slander than when an imputation is made on a woman of loss of chastity, yet, as the law stands, no damages can be recovered from the traducer, unless specific damage can be proved, which, in many instances, is simply impossible. Chief Justice Cockburn has said, "I think the law very cruel in preventing a woman who has been thus wantonly slandered from bringing an action for the purpose of vindicating her character." Lord Brougham considered the law not only "unsatisfactory" but "barbarous," while many other judges have regretted the state of the law in this respect, and expressed their dissatisfaction that they were not at liberty to determine differently. Illness may ensue from the excitement produced by the slander; a wife may become ill and incapable of managing her domestic affairs; her husband may be put to expense in curing her, and yet it is held, that mere mental suffering or sickness, supposed to be caused by words not actionable in themselves, would not be special damage to support an action. Let, however, the words be written, and the libeller would be liable to either imprisonment or damages.

We would here invite attention to the punishment of the slanderer. In the time of Alfred, the *publicum mendacium* was punished by the cutting out of the tongue, subject to redemption, *juxta capitis æstimationem.* The Greeks inflicted a penalty on the offender, and the Romans added to the fine the mulcting of the defendant in damages. Until very recently, the Ecclesiastical Court had jurisdiction in cases of defamation, and we find in the *London Chronicle* of 1790, that a lady was publicly excommunicated in that year—

> "For defaming the character of another lady acquaintance. She was put in the Spiritual Court some time since, but refused to make any concession, although repeatedly applied to by the friends of the other lady. The consequence of excommunication is she cannot enjoy any legacy, inherit an estate, or receive benefit by law except in criminal cases."

By the 18 & 19 Vict. c. 41, the jurisdiction of the Ecclesiastical Court in cases of slander has been abolished, and the only remedy now left is by action of damages.

It has been said by a learned writer:—

> "It would be highly inexpedient and mischievous to subject the utterer of every expression which might possibly provoke offence and retaliation, and ultimate violence, to a penal prosecution; it would be attended with fearful evils, legal as well as moral, if men's mouths were to be closed to all communications in which the character or reputation of others might possibly be involved. What, then, is to be done if the evil cannot wholly be excluded, and cannot be tolerated without some restraints?"

We think that the same necessity of proving legal malice as now would exist should slander be made punishable in a Criminal Court, and it would certainly have as strict proof. We respectfully differ from the great authority we have quoted in thinking that men's mouths would then be closed in any fair or just communications respecting the character of others; and we think that the present law places the poorer classes, to whom not unfrequently their character is their one chance of livelihood, in an unequal position before the law. A working man who has been foully slandered, and who has sustained special damage, must bring his action, and must give security for costs. This with many is an impossibility; and so the slanderer may reiterate his falsehoods, and ruin his victim without the latter having any means of redress. What wonder, then, that the experience of Criminal Courts will show a long array of crimes of violence, arising from unchecked slander. Libel is in law worse than slander, because (it is said) of the more durable publicity, and the deliberation of the slanderer in reducing the statements to writing; and therefore it has been made penal, while slander is comparatively free. We do not urge that the same punishment should be awarded to the slanderer as the libeller, but we can see no reason why the utterer of a false and malicious falsehood, tending to the damage of another, should not be compellable before magistrates to enter into recognizances for his good behaviour for the future, and that words which if written would be libels, should for the purposes of binding over be considered slanders if spoken.

In the consideration of this subject, we have derived considerable advantage from the perusal of the recent edition of "Starkie's Law of Slander and Libel," edited by Mr. Folkard.—*Law Magazine.*

## CRIMINAL TRIALS WITHOUT JURIES.

The Canadian Parliament last year passed a very remarkable Act, making a radical change in the constitution of criminal courts by dispensing with juries. A writer in the *Canada Law Journal* for November says, "It is one of those gigantic strides in legislation, the full bearing and extent of which is not at first fully perceived, but when brought into use, and its value seen, we all are apt to wonder why it was not long before placed on the Statute Book."

This is certainly an accurate description; it is a gigantic stride in legislation, and one which requires strong evidence of its beneficial operation to induce approval in this country. A correspondent, in a position which gives him an opportunity of learning the general feeling of the country, tells us that the statute was introduced by the head of the Government of Ontario, the Hon. Mr. Attorney-General Macdonald, and "that the measure has been most favourably received by the Judges, the Bar, and the general public."

From the artcile in the journal before mentioned we find the scope of the statute to be this. Each local judge in Ontario sittting under the provisions of the statute, and for every purpose connected with or relating to the trial of offenders, is created a court of record. No regular sittings are appointed, but the court sits from time to time as occasion may require. The Clerk of the Peace is appointed to act as clerk of the court, and the sheriff acts in the same way as in other criminal courts.

The *jurisdiction* of the court, as respects the nature of the charge, extends to "all offences for which a prisoner may be tried at a general session of the peace," in other words, *to nearly every crime, short of a capital felony, known to the law;* and if convicted, "such sentence as the law allows and the judge thinks right" may be passed upon the convicted persons. The jurisdiction, however, is limited to persons committed to gaol on such charges and consenting to be tried by the Judge.

The *procedure* is this: Within twenty-four hours after a prisoner is committed to gaol for trial upon any such charge, the sheriff notifies the Judge of the fact, and when the local prosecutor is ready to proceed (having received and examined the depositions and papers which the law requires to be laid before him for the purpose) he informs the Judge, and an order is at once issued, and under it the prisoner is brought before the Judge in open court. A formal accusation in the nature of an indictment describing the offence (prepared in the mean time by the public prosecutor from the depositions, &c.) is then read to the prisoner by the Judge, as the charge against him. The prisoner is then informed by the Judge that he has the option of being forthwith tried by the Judge without the intervention of a jury, or remaining untried till the next court of general session of the peace, or oyer and terminer. If the prisoner, as he has a right to do, declines the jurisdiction and demands a jury, he is remanded to gaol. If he consents to be tried by the Judge, he is at once arraigned and called upon to plead to the accusation. If the prisoner plead "guilty" sentence is at once passed. If his plea be "not guilty," his trial is at once proceeded with, if the Crown and prisoner are both ready, or, if not ready, the proceedings are adjourned to an early day. On that day the trial is entered upon, but may be further adjourned in the discretion of the Judge for the purpose of completing the evidence for the Crown; that is, before the prisoner has gone into his evidence: or to enable the prisoner to produce other and further evidence, of which he was not aware at the time he entered on his defence, as being material thereto. The rule as to the other proceedings, and as to evidence at the trial, is the same as in ordinary cases, and before passing sentence upon the prisoner, the same questions will be asked as in other criminal courts; and if the prisoner has anything to urge why judgment should be arrested, or why sentence should not be passed, it is to be heard and determined by the court. None but barristers-at-law will be heard as counsel.

The arguments advanced in favour of this procedure are, (1) speedy trial of prisoners, and thereby a saving of expense; (2) the prevention of the lengthened association of young with hardened criminals before trial; (3) provision against the injustice of keeping innocent persons incarcerated who are unable to find bail. The one argument in favour of a trial before a single Judge, instead of before twelve, is obvious. "What intelligent man," it is said, "conscious of innocence, would not prefer being tried before an educated man, trained to the investigation of facts and above the reach of irregular influences, rather than by a number of men taken from the general community, utterly unacquainted with the investigation of facts, and with but little scope for the exercise of their reasoning powers." This is the whole question, and it is a question which is coming more nearly to the surface in England, and our criminal courts are now the only courts in which a Judge cannot by any possibility be called upon to decide upon facts. In Chancery, Bankruptcy, Common Law, and Divorce, the Judges are now in various ways selected by the parties to adjudicate upon facts. It would be in the last degree unconstitutional o compel any person to submit to judicial decision upon both law and fact, and more particularly so where the subject matter is a criminal charge. But we can easily believe that even in England the time is not far distant when it will be made optional for the prisoner to be tried with or without a jury.

At any rate we fully concur in the views of our Canadian contemporary, and consider the experiment one which in a new country might be safely made with possibly useful results. And we in the old country may derive advantage from observing the operation of the statute, and if we see that it works well, may in time follow the example thus set us.—*Law Times.*

## ONTARIO REPORTS.

### ELECTION CASES.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Reg. ex Rel. Ford v. McRae.

*Treasurer—Annual appointment—Election—Contract with Corporation—Notice to electors of disqualification.*

The Treasurer of a Township was appointed by annual by-laws, which were silent as to time, in 1859, 1860 and 1861. In 1861 the defendant became his surety by bond, which, however, did not state the duration of the liability. In 1863 the same Treasurer was also appointed by a similar by-law. In 1864 the by-law limited his liability to the year 1864. From thence to 1868 no time was specified, but was in that year. In 1869 the Treasurer's accounts were audited and found correct. *Held*, that this bond was only a continuing security until the expiration of the Treasurer's term of office, and that the liability ceased on his re-appointment in 1863, and that therefore the defendant had not an interest with the corporation so as to disqualify him as a councillor.

To entitle a candidate to the seat claimed by him on the ground of his opponents disqualification, it must be shewn that the qualification was objected to at the *nomination*, so that the electors might have an opportunity of nominating another candidate.

[Chambers, February, 1870.]

This was a writ of summons in the nature of a *quo warranto*, calling upon Farquhar McRae to show by what authority he exercised or enjoyed the office of Reeve of the Village of Colborne, and why Charles Raymond Ford should not be declared duly elected to the office of Reeve and admitted thereto.

The statement and relation of Ford complained that he Ford was duly elected Reeve, and ought to have been returned, &c., &c. He stated the following cause why the election of the defendant to the office should be declared invalid, and he, Ford, duly elected thereto—First, that the defendant was disqualified by reason of his having at the time of such election, an interest in a contract with the Corporation of the Village of Colborne, in that he was bound in a bond to the said corporation in $2,000, for the faithful performance by one Merriman of the duties of Treasurer of the Municipality, of which the electors had notice. That before the opening of the poll on the 3rd of January last, he Ford notified the Returning Officers and the electors then present, that he claimed to be duly elected Reeve for the present year, and protested against any poll being opened or votes taken by the Returning Officer for candidates, and delivered to him and to the defendant printed copies of the following notice:—"Take notice that I claim to be duly elected Reeve for the Village of Colborne for the year 1870, on the ground that I am the only person duly qualified, who was nominated and seconded for that office, at the nomination of Reeve and Councillors for the Village of Colborne, for the year 1870. Mr. F. McRae, the only other person nominated for Reeve, being disqualified on the ground that he is surety for J. M. Merriman, Treasurer of this Municipality. I hereby protest against any votes being received by the Returning Officer for any candidate for Reeve, and notify the electors that any votes given by them for candidates for Reeve, will be thrown away,

(Signed) C. R. Ford."

The relation further stated that printed copies of such notice were posted up in conspicuous places, prior to the opening of the poll.

*Robt. A. Harrison*, Q.C., supported the summons, and contended that it did not matter whether there was any liability on the bond, but the question was whether there was a contract with the Corporation, and it was admitted that there was, and no discharge was shown. The bond, too, was conditional, to the effect that the Treasurer should at all times, during which he held his office, do certain acts enumerated. The office is not an annual office. The re-appointment of the Treasurer from year to year was an unnecessary Act. He cited secs. 161 and 177 of the Act of 1866; *In re McPherson, and Beeman*, 17 U. C. Q. B. 99; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44; *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N. S. 126. The notice being given before the day of voting was sufficient to entitle the relator to the seat if the defendant should be disqualified; for if the electors had the notice, they threw away their votes, which was all that was required.

*Armour*, Q. C., shewed cause, and contended that the appointment of Treasurer was an annual one, and the bond was of no effect after the year was up: *Peppin* v. *Cooper*, 2 B. & Al. 431; *Liverpool Water Works Co.* v. *Atkinson*, 6 East, 507; *Angero* v. *Keen*, 1 M. & W. 390; *Bamford* v. *Iles*, 3 Exch. 380; *Mayor of Berwick* v. *Oswald* 1 E. & B. 295, 3 E. & B. 653, 5 H. L. Cases, 856; *Pybus* v. *Gibb*, 6 E. & B. 902; *Reg.* v. *Hall*, 1 U. C. P., 406; *Reg. ex rel. Hill* v. *Betts*, 4 Prac. Rep. 113 He also contended that the objection to the election was taken too late; it should have been taken at the nomination, and the notice was given just before the election: *Reg. ex rel. Tinning* v. *Edgar*, 4 Prac. Rep. 36; *Reg. ex rel. Adamson* v. *Boyd*, 4 Prac. Rep. 204: *Reg.* v. *Mayor of Tewksbury*, L. R. 3 Q. B. 629.

Affidavits were filed on both sides. The material facts are referred to in the judgment of

Morrison, J.—In this case there are no disputed facts. It appears that on the 20th of December last, at the nomination of Reeve for the Village of Colborne, for the present year, the relator and defendant were duly nominated as candidates for the office—no objection at such nomination being made to the qualification of the defendant. A poll being demanded, the polling was fixed under the statute for the first Monday in January; on that day the relator publicly notified the electors, as stated in the notice set out in his statement, that he claimed to be elected Reeve, on the ground that the only other person nominated being the defendant, he the defendant was disqualified, on the ground that he was surety for the Treasurer of the Municipality, and he notified the electors that any votes given by them for Reeve would be thrown away. The election nevertheless proceeded, and the defendant was declared elected—having a majority of votes.

On the 12th of January this application was made.

It appears from the affidavits filed that Mr. Merriman, for whom it is alleged the defendant was a surety, was first appointed Treasurer by a by-law for the year 1859, again by by-laws for the years 1860 and 1861, respectively. In the latter year the defendant became one of his sureties. The bond contains no recital, but the condition is—"That if Merriman do and shall from time to time and at all times during his said office as Treasurer of the said Municipality, to which he has been appointed, well and truly account for all monies which he may from time to time receive, &c., and pay over and deliver any sum or sums ordered to be paid by the said Municipal Council, their successors or assigns, and in all things duly execute and perform the duties of his said office, and if upon his discharge or at the expiration of his term of office, he shall render up quiet and peaceable possession of the books and accounts belonging to his said office as Treasurer, &c., unto the said Municipality, their successors or assigns, then the obligation to be utterly void, &c."

Now it appears that this Council annually appointed by by-law their Treasurer: that Mr. Merriman, as already stated, was so appointed in the years 1859, 1860 and 1861, and in the latter year the defendant became his surety. Mr. Merriman was afterwards re-appointed Treasurer by by-law in 1863, and also in 1864, in the previous years his appointment was, as to time, silent; in 1864 the by-law specifically limits his appointment to the year 1864; in the following years he was also re-appointed without specifying the period, until 1868, when his term of office was again limited to that year. At the end of all these years, including 1869, the Treasurer's accounts were duly audited and found correct. Attached to the Treasurer's affidavit is the bond in question, and it further appears by an indorsement on it, that by a resolution of the Council it has been cancelled. This was done since this application was made, and could have no effect on my decision, but I only note the fact as shewing that the Municipality consider they have no claim under it. I also may remark, that in the year 1863 this defendant was elected a member of the council.

Looking at the conditions of the bond, from which I must gather the contract between the parties, it refers to Merriman's then appointment as Treasurer, and the limit of the sureties in point of time is that of his discharge or the expiration of his term of office. Now, considering that this office of Treasurer was by the uniform rule and action of the Municipality an annual one and under the authority of an annual by-law, and the condition of the defendant's bond contemplated an expiration of the treasurer's term of office, it is, I think, only reasonable to assume, that the Municipality and the Treasurer acted upon the assumption that the term of office expired at the end of each municipal year, and that the sureties joined in the bond knowing such to be the case and only for the year, as sworn to by the defendant. It is true, as argued by Mr. Harrison, if the Treasurer had not been re-appointed, that under the 177th section of the Municipal Act he would hold office until removed by the Council. But the fact of his re-appointment in 1863 implied at all events that his term of office expired at the end of 1862, and his re-appointment by by-law in 1864, expressly limiting his appointment to that year. At the end of that year his term of office certainly expired, and as he made no default but faithfully performed his duty, &c., as Treasurer, up to that period, his sureties under the bond in question were discharged from all liability—if they had not been discharged at the end of 1861 or 1862. There are no words in the condition indicating that the sureties engaged to be liable upon his re-appointment from time to time. The council might have taken a bond continuing the liability of the sureties upon fresh re-appointments, but such an intention should expressly appear in the bond. What was said in giving judgment in the case of *Mayor of Cambridge* v. *Dennis*, E. B. & E. 659, which was the case of a treasurer's bond, has a strong bearing on this case There the learned judges were of opinion that the sureties did in fact look beyond the current year, but they were constrained to give judgment for the sureties. Coleridge, J., said, "I incline from what generally passes on these occasions to believe that the parties did not think much about the point, but knowing that the office was annual gave their security for it as they found it. However supposing that not to be so, we are clearly not at liberty to resort to such considerations in construing this instrument; we must take its words and apply the law to them. It is admitted that, *prima facie*, the security would be limited to the time for which the office was appointed, and it lies on the plaintiff to displace this—and that seems to be just. The obligor knows at the time to what extent he is bound, and may estimate the liability which will devolve on him during the time, but he cannot know what liability may devolve on him at a distant time. Suppose two different instruments in writing were presented to him and he were asked, will you be surety for one year or for the whole life of the officer if he continues in office, would not any man consider there was a great difference between the two. I think therefore the presumption is, the defendant proceeded upon the rate of things which he knew to exist, and that was, that the officer was appointed for a year, and was liable to be not appointed for a second year; if that was presented to the mind of the surety he would execute the bond with the knowledge of his liability, unless the terms of the instrument were altered, would be over at the end of the year." And Crompton, J., said, "It is important that we should judge by the rules of law and not by guess. Nothing is better established than that a surety executing such an instrument as this is to be taken to be giving security only in respect of the existing office. When there is a re-appointment he has a right to say the office is not the same." I refer also to the various authorities cited in that case.

On the whole I am of opinion that this bond was only a continuing security until the expiration of the Treasurer's term of office, which term ended upon his re-appointment in 1863, and at the furthest ended in 1864 under the by-law limiting it to that year, and as it appears that up to that period, and years after, the Treasurer duly performed the duties of his office, and the liability of the defendant ceased under the bond. And that at the time of the nomination of the defendant and of his election he had no interest in a contract with the corporation arising under the bond in question, and this application must therefore be discharged.

It is not necessary that I should give any judgment on the other point raised I however considered the question, and I arrived at the conclusion, that as the defendant's qualification was not objected to at the nomination but at the time of the polling, when the electors could not nominate another candidate, it would be unjust to the electors and unreasonable under such circumstances, to deprive them of a further opportunity of electing a person of their choice.

The application must be discharged with costs.

*Order accordingly.*

## COMMON LAW CHAMBERS.

### In the Matter of Mary Therese Kinne.

*Custody of infant—Right of father.*

A girl aged thirteen years and ten months, who had lived with her aunt from infancy, was allowed, on an application by her father for her custody, on allegations that she was illtreated by her aunt, to elect whether she would remain with her aunt or go to her father.

*Semble*, That if the child had recently left or been taken away from her father she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen.

[Chambers, January 12, 1870.]

On the 6th December, 1869, *O'Brien*, on behalf of Thomas Kinne, the father of Mary Therese Kinne, obtained a writ of *habeas corpus* under the provisions of 29 & 30 Vic. cap. 45, on the fiat of Mr. Justice Galt, commanding Stephen Keever and Lucy Keever, and such other person as might have the custody or control of the said Mary Therese Kinne, to have her body before the presiding judge in Chambers, &c.

The order for this writ was founded on the following affidavit of the father of the girl who described himself of the Town of Hopewell, in the County of Albert, in the Province of New Brunswick, farmer:

"Mary Therese Kinne, now to the best of my belief residing in the Township of Harwich, in the County of Kent, of Canada, is my daughter by my late wife, Mary Kinne, now deceased. She was born in Harvey, in the County of Albert aforesaid, on the fifth day of March, one thousand eight hundred and fifty six, and for the greater part of her life she has resided with her aunt Lucy Keever, wife of Stephen Keever, of Harwich aforesaid, yeoman. Her mother died about three years ago.

In August last I received letters from the said County of Kent, from persons acquainted with said Keever, and from the information they contained I was induced to travel from my home in New Brunswick to Chatham in Kent aforesaid, to look after the child, and from the information I have received from inquiries made since my arrival in Chatham, I have no doubt that she is and has been most brutally and inhumanly treated by her aunt aforesaid, and that it is absolutely necessary that I should take her in my charge and provide for her myself at my home in New Brunswick.

Upon my arrival in Chatham, I had interviews with the said Keevers, and informed them of my desire that the child should return to New Brunswick with me. They seemed at first disinclined to allow this, but afterwards appeared quite willing, and Mrs. Keever said she had only wanted a little delay to prepare clothing for the girl's departure, but this appears to have been only done to lull suspicion, as both the Keevers now absolutely refuse to give up the child, and state that she has left them, and they do not know where she is, but Mrs. Keever said she could find her."

On 17th December, Stephen Keever and Lucy Keever, made and filed a return to the writ to the effect that they could not produce the said child as commanded, as she was not and had not for some weeks past been in their custody or control. This return was verified by their affidavits.

An enlargement was thereupon obtained to enable Thomas Kinne to object to the sufficiency of the return to the writ, and to contradict the truth of the facts set forth in the return, under sec. 3 of 29 & 30 Vic. cap. 45.

Pending this examination of the truth of the return, and of an intended application under sec. 2 of the same act, for the apprehension of the Keevers for disobedience of the writ, Mrs. Keever appeared in Chambers with the child, alleging that since the filing of the return she had ascertained where the child was, and that she then produced her in obedience to the writ. The next day, Thomas Kinne, Mrs. Keever and the child being in court,

*O'Brien* moved for an order for the delivery of the child to her father. He filed affidavits charging Mrs. Keever with neglecting the child's education, with severe and improper punishment of the child: with gross acts of cruelty to her, which were alleged specifically: that Mrs. Keever was of such an ungovernable temper, that she was not fit to be entrusted with the care of a child: that the child was of weak mind from the effects of the ill treatment; and, from her youth, ill treatment and fear of her aunt, was not fit to judge for herself as to with whom she would prefer to remain. He contended that the father was legally entitled to the custody of the child, at all events as against a stranger, which, in the eye of the law, the aunt must be taken to be, and that an order should be made for the delivery of the child to the father: that the affidavits established improper treatment of the child generally, and several specific acts of personal violence towards the child of an outrageous kind: that the child should not be allowed to choose which she would prefer going to, being of such tender age, and not being of sufficient intelligence to exercise a reasonable judgment; and, that even if so very intelligent as the aunt contended, such precocity itself might be required to be guarded against: that being under fourteen years of age, she would in law be deemed incapable of exercising an election; that she was in fear and dread of her aunt, and would act under the influence of that fear, and that the aunt had taught the child to dislike her father: that it would be improper in every way, and contrary to the law of nature that a father should be deprived of his child whom he had not abandoned and was willing to support, and whom he had evinced his determination to protect by coming the great distance he had, upon hearing the reports of her ill treatment by her aunt, and that it would be great cruelty to the father to let him return home believing that his child was ill treated, and induced to dislike him.

*J. B. Read*, in reply, filed affidavits stating that the child was, when about seventeen months old, taken by its aunt, then unmarried, to bring up, with the consent of her father and mother: that the aunt had continued to have the care of the child until its mother's death: that after that event, with the consent of the father, the child continued to remain with the aunt: that with the same consent and permission the child was brought to the Province of Ontario from New Brunswick, where all the parties resided: and that the child had ever since remained with the aunt. The charges of cruelty, both general and specific, were denied by Keever and his wife, and their statements were corroborated by others. It was also stated that the child was sent to school and well taken care of: that there were feelings of hostility between Mrs. Keever and the relatives of her husband, who were said to be afraid that Keever, who was well off, would leave his property to the child: that the child's father had no house of his own but boarded out, and that the future welfare of the child rquired that she should remain with her aunt.

He urged that in addition to the evidence in the affidavits, that the very appearance of the child refuted the charges of neglect of her bodily wants or mental culture: that the child was resolved not to go with her father, but to remain with her aunt: that if the Judge was satisfied that the case was met on the affidavits, the father could not complain, as he had suffered the child to grow up from infancy with the aunt, who had all the care and trouble of training and providing for her, and was attached to her: that in law the father was not legally entitled to the custody of the child under the circumstances: that all the court or a judge could do would be to order that the child should be removed from any restraint on the part of her aunt, and be given to understand that she was free to go with whom she pleased, without fear of the consequences: that if she preferred to go with the father she should be allowed to go with him, if with the aunt, then to go with her.

The following cases were cited: *Rex* v. *Smith*, 2 Strange, 982; *Rex* v. *Greenhill*, 4 A. & E. 624; *Rex.* v. *Isley*, 5 A. & E 441; *Reg.* v. *Smith*, 22 L. J. Q B. 116; *Ex parte Barford*, 3 L. T. N. S. 467; *Reg.* v. *Howes*, 17 Jur. N. S. 22; 3 El. & El. 332.

The case was argued before the Chief Justice of the Common Pleas and Mr. Justice Gwynne, who examined the child for some time apart from her father and aunt, to ascertain the degree of intelligence she had attained, and explained to her fully that she was free from all restraint of her aunt, and was then under their protection.

Judgment was thereupon given by

**Hagarty, C. J., C. P.**—We have carefully examined this child and explained to her her position. We have also read with much care the affidavits filed on both sides. We think that the father, upon hearing the reports of the alleged cruelty, acted very properly in making this application, and did what we should expect a parent to do in such a case, but we do not think he can succeed in his present contention.

The affidavits are certainly conflicting, but there is a very satisfactory denial, well supported, of the alleged cruelty of the aunt; and the circumstances connected therewith are somewhat unusual, because it is seldom that parties are so fortunate as to be able to procure such strong corroboratory evidence in denial of such specific charges as is now produced. We consider the charge of want of intelligence of the child not in any way supported; her manners and answers establish to our satisfaction that the child is a peculiarly intelligent one, and fully understands her position.

The only order we can make is, that the child is free to go with whom she chooses. It is perhaps only natural that having lived nearly all her life with her aunt and not knowing her father, she will, if the latter has treated her well, prefer to remain with her aunt than go with her father; and it is important to be remembered that the aunt and her husband have, since the child was an infant, taken care of her and provided for her, at their own expense, and the father has not, until now, made any effort to get the child to return to him, and has paid no part of the expense of maintaining her. If she has not been well treated she has now an opportunity of leaving her aunt and going to her father and other relatives in New Brunswick.

We should regard the case very differently if this girl had recently left or been taken away from her father. In such a case the law apparently orders her to return to her father, without reference to her own choice, at all events until she attain the age of sixteen.

The case of *Reg.* v. *Howes, ante*, cited by Mr. O'Brien, is very strong as to the general rule. Our Statute, Con. Stat. Can. ch. 91, sec. 26, supports that general view.

We decide this case on its particular circumstances without infringing, as we believe, on the principles laid down in *Reg.* v. *Howes.*

Upon the child electing with whom she will go, the disappointed party must be careful not to resort to any improper means to deprive the other of the child.

The learned Chief Justice then told the child that she might go away either with her father or her aunt, and she at once with apparent willingness went to the latter.

## QUEEN v. ROBINSON.

[Chambers, January 26, 1870.]

*Extradition—Evidence—Deposition—31 Vic. cap. 94.*

Under sec. 2 of the above Act, the depositions that may be received as evidence of the criminality of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it.

A writ of *habeas corpus* was issued directing the keeper of the gaol of the county of York, to bring up the body of John O. Robinson. The body of the prisoner was accordingly produced before Morrison, J., with the writ and return.

The cause of detention was shewn to be a warrant of Alexander McNabb, Esq., the Police Magistrate of the City of Toronto, dated the 22nd day of January, 1870, setting out that the prisoner was charged, on the oath of one Warren, a deputy United States Marshal, and others, that he did on or about the 10th April feloniously &c. burn and consume a certain dwelling house in the town of Somerville, &c., in Massachusetts, one of the United States; to be detained in custody until surrendered according to the stipulations of the treaty between Her Majesty and the United States of America, or until discharged according to law.

A writ of *certiorari* was also issued at the same time under which the Police Magistrate retained all the proceedings had before him. It appeared from them that an information had been laid before Mr. McNabb on the 22nd December last, by one John C. Warren, a Boston Deputy United States Marshal, stating that he had been informed, and believed, that the prisoner on or about the 10th April last, did feloniously &c. burn and consume a certain dwelling house (not stating the owner), at the Town of Somerville, in the County of Middlesex, in the State of Massachusetts—and not even stating that the prisoner fled to Canada. On this the Police Magistrate issued his warrant on the same day for the prisoner's apprehension, and upon which warrant he was arrested. He was remanded until December 24th, when John C. Warren examined and deposed that — he knew the prisoner: that he left Somerville last June or July: that he was charged with setting fire to a house owned by one Bassett. A paper was produced to the witness which contained statements and depositions made by three persons, named Patton, Horton, and Fingay, stating conversations and facts with the prisoner relative to the burning of the house in question—underneath which statements and depositions was written—"Middlesex, December 18, 1869. There personally appeared the above named (naming the parties), and made solemn oath to the truth of the above statements by them subscribed. Before me, Isaac S. Muse, Justice of the Peace." The witness Warren stated he was present when these statements were made, and that he saw the Justice of the Peace, Muse, sign them; he also stated that he was not aware that any warrant issued on these statements or depositions—he said that a warrant had issued for the prisoner's arrest before the depositions in question—but he was not aware that any depositions were taken under such warrant; he also stated that he knew Patton and Horton, that he had had a bench warrant in July last against the prisoner upon a criminal charge, arising out of the bankruptcy of the prisoner, upon which it appeared the prisoner had been arrested, and that Patton and Horton had became bail for him in the charge. The prisoner was remanded to the 31st December, when Warren was again examined, and a certificate being shewn to him, he stated it was a certificate of one John W Pettingill, Trial Justice for the County of Middlesex; he proved this certificate, and that he Pettingill was a Trial Justice—no evidence was given as to what was meant by a Trial Justice. The certificate was dated 28th December, 1869, and it certified "that the within complaint and warrant are true copies of the original complaint and warrant before me; also, that the within named John O. Robinson hath not appeared or pleaded to the said complaint since the date of the same." Attached to this certificate was a complaint—commencing as follows: "To John W. Pettingill, Esq., a Trial Justice, &c., Calvin Horton on behalf of the commonwealth of Massachusetts, on oath complains, that John O. Robinson, &c, on the 18th of May, 1869, &c, the dwelling house of one Barrett, in Somerville, &c, feloniously &c., set fire to &c.,"—and he prayed that he might be apprehended and held to answer to said complaint, &c.—underneath, on the same sheet was warrant to take the prisoner and bring him before the said Trial Justice, or any other Trial Justice, in any Police Court, &c., to answer to the foregoing complaint of Calvin Horton &c. The witness stated that he saw the original warrant and information in September last; that he compared the copy made then with the original information and warrant, and he said he knew the copies produced to be true copies; he stated however, that he never compared them with the original, nor did he see them compared.

The prisoner called witnesses, from whose testimony it appeared that he left the United States on account of the charge arising out of his bankruptcy, and that Horton and Patton were his bail, and that Horton boasted he would have the prisoner brought back: that the house in question was only partially injured by fire on 19th April last. The person who contracted to build the house was also examined. The house was not finished but in course of construction at time of fire, and no person resided in it at the time; other evidence was given to shew that the owner Barrett was suspected to have burnt it. Upon this evidence the Police Magistrate committed the prisoner for the purpose of his extradition.

*D. B. Read*, Q C., and *Dr. McMichael* for the prisoner, took various objections to the proceedings:—The information upon which the Police Magistrate acted was insufficient, and did not warrant him to order the arrest of the prisoner, and the subsequent proceedings: that the depositions of Patton, Horton, and Fingay, taken in the United States, were not depositions that could be used or received as evidence of the criminality of the prisoner: that if they were receivable they were not properly certified and attested: that the complaint and warrant made before and issued by the Trial Justice were not receivable, being only copies of copies, and that no explanation or proof was given of the duties or authority of a Trial Justice: that it appeared that the prisoner was not guilty of arson, the building set fire to being an unfinished and unoccupied house, and not the subject of arson, and that the warrant under which the prisoner was now detained was insufficient, in not stating whose house the prisoner set fire to.

*John Patterson* on the part of the Minister of Justice, contended that the depositions were such as could be received, and that they were properly before the Police Magistrate.

Morrison, J.—The first and most material point for determination is whether there appears upon these papers returned before me, as provided by the statute 31 Vic. c. 94, s.1, of the Dominion (Reserved Act, see stat.32,33 Vic. p.12) such evidence, as, according to the laws of this Province, would justify the apprehension and commital for trial of the prisoner if the crime had been committed here. Under the statute it is the duty of the officer (in this case the Police Magistrate), to examine upon oath, any person or persons, touching the truth of the charge; and by sec. 2, in addition, it is provided, that upon the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. In this case no oral testimony was given by any witness touching the truth of the charge against the prisoner; all that was done was the laying of an information by an officer who deposed that he was informed and believed, that the prisoner did burn and consume a certain house, without stating whose house it was, on the 19th April, 1869.

The truth of the charge must therefore wholly depend upon the depositions upon which the original warrant was granted in the United States. On this argument it was conceded that unless the statements or depositions of Patton, Horton, and Fingay, taken before Isaac S. Muse, the Justice of the Peace, on the 13th December, 1869, were receivable and could be read against the prisoner, the case must fail, these depositions containing the only evidence to justify the prisoner's committal. The original, and the only warrant that appears to have been issued in the United States was the one before me, issued on the 20th September, 1869, by one Pettingill, styled a Trial Justice (whom I assume, although no explanation was given at the time, to be an officer like our Police Magistrate), upon a complaint made and addressed to him, that the prisoner on the 18th May, set fire to the dwelling house of one Barrett. As our Statute permits depositions taken in a foreign court to be read in lieu of oral testimony, and where the case depends wholly upon such depositions, we must be strict in seeing that they are depositions coming clearly within the meaning and provisions of the 2nd section of the Statute. Now the state- or depositions that were received as evidence of the criminality of the prisoner and objected to, were made on the 18th December, three months after the original warrant issued. They are not depositions made before the Trial Justice who issued the warrant, but before another officer, a Justice of the Peace. They have no caption, nor do they state or indicate in any way, on their face or otherwise, nor does it appear by any testimony, written or oral, with what object or for what purpose they were made, whether with a view to the issuing of a warrant, or in reference to any antecedent warrant or legal proceedings; they are not certified or referred to by the Trial Justice who issued the warrant, or the Justice of the Peace before whom they were made. For all that appears, these statements may have been made for some other purpose, quite distinct from any criminal charge against the prisoner. It is to me quite clear, under the 2nd section of the Act, that the depositions that may be received as evidence of the criminality of the prisoner, are depositions upon which an original warrant was granted in the United States, certified under the hand of the person issuing it. Now the statements or depositions in question are certainly not depositions upon which the original warrant was granted, for they were, as I have stated, made several months after, and are not in any way connected with the warrant; and in my opinion, they were clearly not receivable as evidence touching the truth of the charge, or the criminality of the prisoner; and as without them there was no evidence to justify the committal of the prisoner for extradition, he is entitled to be discharged Such being the decision I have arrived at, it is quite unnecessary for me to consider or decide the other points raised, some of which it appears to me, upon consideration, would entitle the prisoner to be discharged.

The prisoner will be discharged out of custody upon this warrant.

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## BONATHAN V. BOWMANVILLE FURNITURE MANUFACTURING COMPANY.

*Patent—Injunction.*

In an action for an infringement of a patent, an application under the C. L. P. Act for an injunction to restrain the defendant was refused, the patent having been very recently granted, and their being conflicting affidavits as to the rights of the plaintiff to the patent, and *held* that the plaintiff must establish his title at law before he would be entitled to an injunction.

*Semble* 1.—That the application would also have been refused under the Patent Act of 1869, sec. 24.

2.—That to entitle a plaintiff to an interim injunction or account he must waive all claim to more than nominal damages at the trial. [Chambers, Feb. 11, 1870.]

This was an application made after appearance and before declaration, for an injunction to restrain the defendants from infringing a patent granted to the plaintiff on the 15th October, 1869, in pursuance of the Acts of that year. The patent was for an invention called the "Economical Bending Apparatus," to be used in furniture making, and was stated in the plaintiff's affidavit to be an improvement on machines in ordinary use for bending wood for making chairs and other purposes.

Mr. Green, (Patterson & Beatty), on behalf of the plaintiff contended that the letters patent themselves being granted under the seal of the Commissioner of Patents, obtained after compliance with the formalities required by the Act, afforded a strong presumption in favour of the plaintiff's right to the invention patented: that no case was made out by defendant's affidavit throwing any real doubt on the plaintiff's titles, and that at all events, if the plaintiff was not entitled to an injunction the defendants should be ordered to keep an account until the trial of the action. 1 Maddock's Ch. Prac. 191, 192; *Bacon* v. *Jones* 4 Mylne & Craig 483: Patent Act 1869, ss. 24, 25.

*Elmes Henderson* for the defendants filed several affidavits made by the manager and workmen of the defendants to the effect that this process of bending wood was originally introduced from the United States (it was not sworn to be patented there), into this country, and that the only differences between the process so originally introduced and that patented were a few immaterial improvements in the latter, consisting of a screw being used instead of a wedge, and a few others of a like nature: that these improvements were the result of frequent experiments made during working hours and on defendants' materials by the manager along with the plaintiff and the other workmen of the defendants, when each suggested any improvement that occurred to him; and, it was sworn in all these affidavits, that in the opinion of the deponents, any one of them would have been as much entitled to the patent as the plaintiff was; and the manager further swore, that the improvement in the use of the screw before alluded to, which was stated to be the most material improvement introduced by the patent, had been suggested to the plaintiff by the manager himself. He cited *Cosyton* on Patents, 821.

Gwynne, J.—The law of the Court of Chancery as stated by Sir W. Page Wood, V. C., in *Betts* v. *Mensie*, 3 Jur. N. S. 358, is, that where the patentee has had long enjoyment then he shall have an injunction to protect his right until trial, even though his right under his patent be doubtful. Here the patent is not only very recently granted, but there are several affidavits filed by defendants not only to shew that the patented article was in use by the defendants when the patent was granted to the plaintiff, but that the plaintiff acquired his knowledge of the article when hired as a servant of the defendant, employed by them in the course of their business in the use of the article patented, and in experimenting for improvements, which experiments' resulted in the very improvements which have been patented. Under these circumstances, upon the authority of *Gardner* v. *Broadbent*, 2 Jur. N. S., 1041, I refuse to grant any injunction, and consequently any interim account. The summons will be discharged with costs to be costs in the cause to the defendants.

I have regarded the application as made under the Common Law Procedure Act, but assuming that a judge in Chambers can act under the Patent Law Amendment Act during Term, and that any judge, other than a judge of the court in which the action is pending, can make an order under that Act, my decision would be the same in this case.

To entitle a plaintiff to an interim injunction or order for an account under that Act, it would seem that the plaintiff must accept the condition of waiving all claim to recover more than nominal damages at the trial of the action, *Vidi* v. *Smith*, 3 El. & Bl. 976. In this case I think the plaintiff must establish his title at law before he can obtain the aid of the court by way of injunction or account, the latter being only granted in substitution for the former.

*Summons discharged.*

## ENGLISH REPORTS.

### Re Phene's Trusts.

*Presumption of death—Person not heard of for seven years—Period of death—Survivorship—Evidence.*

There is a presumption of law that a person who has not been heard of for seven years is dead, but there is no presumption of his death at any particular period of the seven years.

There is no legal presumption that a person shewn to be alive at a given time has continued to live for any particular period after that given time.

A person whose title depends upon A. having survived B. must prove affirmatively by evidence that A. did survive B.

Review of all the authorities on the subject.

*Re Benham's Trusts*, L. R. 4 Eq. 416, 15 W. R. 741, disapproved,

F., by his will, bequeathed the residue of his estate to his nephews and nieces, share and share alike. F. died on the 5th January, 1861. N. P. M., one of the nephews, left his home in Germany, on the 19th August, 1853, and always wrote home regularly until August, 1858. The last letter received from him was addressed to his mother, from on board the United States' frigate *Roanoke*, 15th August, 1858. He was never directly heard of again by any of his family. In 1867, upon inquiries being made of the United States' naval authorities, information was received that N. M., a sergeant of marines in the service of the United States, deserted June 16th, 1860, while on leave from New York to join the Philadelphia station, and had not since been heard of. This information was in answer to a letter of inquiry which stated the letter of N. P. M. of the 15th August, 1858, to his mother. A petition was, in 1869, presented by the administrator of N. P. M. for payment to him of a share of a residue of the estate of F., which was in court to an account entitled "The account of the share intended for N. P. M." Vice-Chancellor James, contrary to his own view of the law, but in deference to previous authorities, ordered the fund to be paid to the administrator of N. P. M.

On appeal,

*Held*, that the administrator of N. P. M. not having proved that N. P. M. survived the testator, had not established any title to the fund.

The Vice-Chancellor's order was, therefore, discharged.

[18 W. R. 303.]

This was an appeal from a decision of Vice-Chancellor James, which is reported 17 W. R. 1087.

The question was whether Nicholas Phené Mill, who had not been heard of for more than seven years, survived his uncle, Francis Phené, who died on the 5th January, 1861. Francis Phené by his will gave the residue of his estate to his nephews and nieces, share and share alike. A sum representing the share to which Nicholas Phené Mill, one of the nephews, would have been entitled in case he survived the testator, was standing in court to "The account of the share intended for Nicholas Phené Mill," and his administrator petitioned for payment of the fund to him.

Nicholas Phené Mill left his home in Germany on the 19th August, 1853, and went to America. He was in the habit of writing home regularly, until August, 1858. The last letter received from him by any of his family, was addressed to his mother, and was dated the 15th August, 1858, on board the United States' frigate *Roanoke*, Boston Navy Yard. He was never afterwards directly heard of by his friends. In fact, the only subsequent information about him was obtained in the following way. In 1867 inquiries were made about him of the United States' naval authorities, and in answer to a letter which stated the letter of the 15th August, 1858, information was received that Nicholas Mill, a sergeant of marines, in the naval service of the United States, deserted on the 16th June, 1850, while on leave from New York to join the Philadelphia station, and had not since been heard of. The Vice-Chancellor, contrary to his own opinion, but in deference to decisions of Vice-Chancellor Kindersley, and a decision of Vice-Chancellor Malins, held that Nicholas Phené Mill must be taken to have survived the testator, and ordered the fund in question to be paid to the administrator of Nicholas Phené Mill. The other surviving nephews and nieces appealed.

*Bristow*, Q C., and *Everitt*, for the appellants. —The *onus* is upon those who seek to displace our title. There is no presumption of the period of death within the seven years, but the time of death must be proved by positive evidence. The petitioner has not proved that Niceholas Phené Mill survived the testator, and, therefore, has not established his title. They cited *Doe* v. *Nepean*, 5 B. & Ad. 86; *Nepean* v. *Knight*, 2 M. & W. 884; *Underwood* v. *Wing*, 3 W. R. 228, 4 D. M. & G. 633; *Wing* v. *Angrave*, 8 H. L. Cas. 183; *Re Green's Settlement*, 14 W. R. 192, L R. 1 Eq. 288; *Dunn* v. *Snowden*, 11 W R 160, 2 Dr. & Sm. 201; *Lambe* v. *Orton*, 8 W. R. 111; *Thomas* v. *Thomas*, 13 W. R. 225, 2 Dr. & Sm. 298; *Re Benham's Trust*, 15 W. R 741. L. R 4 Eq. 416; s. c. on appeal, 18 W. R. 180; *Dowley* v. *Winfield*, 14 Sim. 277; *Re Beasney's Trust*, 17 W. R. Ch. Dig. 140, L. R. 7 Eq. 498; *Lakin* v. *Lakin*, 34 Beav. 443, 13 W. R. 904.

*Amphlett* Q. C. and *Bagshawe*, for the respondent—The question of surviorship is a question of fact for a jury, and, in the absence of evidence to the contrary, they may infer that a person who was alive at a particular period continued to live for some time afterwards. We have shown that Nicholas Phené Mill was alive seven months before the death of the testator, and the reasonable inference for the jury is that he survived the testator, there being no evidence to the contrary. If, as is said on the other side, we are bound to show positively that Nicholas Phené Mill survived the testator, the result would be that if he was seen alive in New York, in robust health an hour before the death of the testator, still positive evidence that he survived the testator must be adduced. This would be absurd. *Re Benham's Trust* goes further than we need. We are content to take the rule of *Doe* v. *Nepean*, which is merely that each case must depend on its own circumstances. In *Rex* v. *The Inhabitants of Harborne*, 2 Ad. & E. 540, which is approved in *Doe* v. *Nepean*, the only evidence of a first wife having been alive at the date of her husband's second marriage, was a letter from her, dated twenty-five days before the second marriage, and yet a finding upon that evidence that she was alive then was upheld. In the recent case of *Reg.* v. *Lumley*, 17 W. R., 685, L R. 1 C. C. R. 196, an indictment for bigamy, the Court of Appeal held that the survivorship of the first husband was a question for the jury. The question is one of probabilities, and we say that in the present case it is more probable that Nicholas Phené Mill survived the testator. In *Underwood* v. *Wing*, there was no evidence at all of survivorship, and the Court, therefore, could only look at the *onus probandi*. *Re Green's Settlement*, *Dowley* v. *Winfield*, and *Re Beasney's Trusts*, are all distinguishable from the present case. In the

*Re Benham's Trust* Lord Justice Rolt merely said that he desired to have further evidence; he did not say that, if no further evidence could be adduced, he should not act on the rule of Vice-Chancellor Malins. In the case before Vice-Chancellor Kindersley he merely acted as a jury, and that is what the Court has to do now. They referred also to *Rex* v. *Twyning*, 2 B. & Ald. 386; *Sillick* v. *Booth*, 1 Y. & C. C. C. 117; Hubback on Succession, 175, *et seq.*; *Doe* v. *Jesson*, 6 East. 80.

*C. J. Hill* for the trustee.

*Langworthy*, and *G. O. Edward*, for other parties.

*Everitt*, in reply.

Giffard, L. J., offered the parties an opportunity of endeavoring to obtain further evidence, but the offer was declined on both sides.

Judgment was reserved.

Jan. 14.—Giffard, L. J.—This is an appeal from so much of an order of the Vice-Chancellor James as directs the residue of a fund which is standing in court to "The account of the share intended for Nicholas Phené Mill" to be paid to his administrator. The order was made upon the hypothesis that Nicholas Phené Mill survived Francis Phené, the testator. The learned Vice-Chancellor, in making the order, stated that he did so in deference to the authority of three cases which were decided by the Vice-Chancellor Kindersley, and a fourth which was decided by the Vice-Chancellor Malins, but at the same time he dissented from their opinions, and expressed a wish that the whole matter should be brought before the Court of Appeal. The testator died on the 5th of January, 1861. According to one view of the evidence, Nicholas Phené Mill was last heard of in August, 1858; according to another view, about seven months previously to the testator's death. That he survived the testator was treated by the Vice-Chancellor, in deference only to the four cases referred to, as to be presumed. It will be desirable, therefore, to examine those cases and such others as bear materially on the subject, before dealing with the evidence more particularly. The cases decided by the Vice-Chancellor Kindersley were *Lambe* v. *Orton*, *Dunn* v. *Snowden*, *Thomas* v. *Thomas*. They were all decided on the same general principles. The propositions ennunciated were, in substance, these:—1st. That the law presumes a person who has not been heard of for seven years to be dead, but, in the absence of special circumstances, draws no presumption from that fact as to the particular period at which he died. 2nd. That a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards. And, 3rd. That the *onus* of proving death at any particular period within the seven years lies with the party alleging death at such particular period. The case decided by the Vice-Chancellor Malins was *Re Benham's Trust*. He adopted and acted on the decisions of Vice-Chancellor Kindersley, but went somewhat further, laying it down "that if you cannot presume death at any particular period during the seven years, then, at the end or expiration of the seven years, you must presume for the first time that he is dead, and you must also presume that within that time he is alive." *Re Benham's Trust*, was appealed, and the Lord Justice Rolt, in November, 1867, discharged the Vice-Chancellor's order, directing further inquiries, and simply stating, according to the only report I am aware of (16 W. R. 180), that "there was no evidence for the Court to act upon, and that it was a case, not of presumption, but of proof." In *Dowley* v. *Winfield*, the testator died in September, 1833. One of his two sons went abroad in September, 1830, and was heard of for the last time about twenty months previously to his father's death. The Court ordered a share of the father's residue bequeathed to him to be transferred to his brother as the sole next of kin of the father living at the father's death. Security to refund was taken. In *Mason* v. *Mason*, 1 Mer. 308, a father and son were shipwrecked together. The rules of the civil law and of the Code Napoleon were relied on. Sir Wm. Grant said: "There are many instances in which principles of law have been adopted from the civillians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. . . . In the present case I do not see what presumption is to be raised, and since it is impossible you should demonstrate, I think that if it were sent to an issue, you must fail for want of proof." An issue was directed whether the son was living at the death of the father. Nothing appears to have come of it. In *Underwood* v. *Wing*, which was also a case of *commorientes*, a testator bequeathed personal estate to J. W., in the event of his wife dying in his lifetime. The testator and his wife were shipwrecked and drowned at sea. On the question being raised between the next of kin of the testator and J. W., who claimed under the will, it was held, first, that the *onus* of proof that the husband survived his wife was upon J.W.; secondly, that it was necessary to produce positive evidence in order to enable the Court to pronounce in favor of the survivorship; and thirdly, that no such evidence having been produced, the next of kin were entitled.

*Underwood* v. *Wing* was heard before Lord Cranworth, Mr. Justice Wightman, and Mr. Baron Martin. Mr. Justice Wightman, in the course of delivering judgment, stated:—"If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide, independant of age or sex; and, if there be no evidence, the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and, of consequence, no judgment can be formed;" and afterwards added:—"We think there is no conclusion of law upon the subject; in point of fact, we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor." In *Wing* v. *Angrave*, another branch of the same case, the House of Lords concurred in the view which had been taken by Lord Cranworth and the learned judges who sat with him. In *Re Green's Settlement*, Mr. Green was murdered in the Indian Mutiny on the 3rd June, 1857; Mrs. Green on the 16th of November following. Mr. and Mrs. Green's child escaped with its native nurse on the same 3rd of June, but was never afterwards distinctly heard of. After the lapse of seven years and upwards, a petition was presented, and the present Lord Chancellor, then Vice-Chancellor, delivered the following judgment:—"I think that the rule which the Court should follow in this case is analogous to that laid down in *Underwood* v. *Wing.* The whole question is, on whom is the *onus* of the proof thrown. The lady on the devolution of whose estate the question arises is shown to have died on the 16th of November; her husband is shown to have died before her. A number of persons claim as her relations, and prove their kindred within a certain degree, and, so far as now appears, there is no one nearer in kindred. On the other hand, the representative of another person claims the property also, and shows that the person through whom he claims was nearer of kin than the petitioners, and would have been entitled if he survived his mother; but a person claiming under such a title must go further, and must show not only that the person through whom he claims would have been entitled if he survived, but that he acually was entitled, or, in other words, that he did survive. I am of opinion also that in this case there was some evidence to go to a jury that the child died in the mother's lifetime; the letter of Mrs. Green shows that at the time it was written the child, an infant in arms, was separated from its father and mother, and was in the hands of a native female nurse, in a time and place where it was almost improbable that it should escape destruction. But I do not rest my decision on this evidence, I prefer to rely on the grounds which I have before stated." There are three other cases in equity—viz., *Lakin* v. *Lakin*, *Re Beasney's Trusts*, and *Re Henderson*, referred to in that case. In all of these the period of the death was inferred as a matter of fact from the circumstances proved; not in any sense presumed.

This appears to be the state of the authorities in the equity courts. The leading case, however, is one at law—viz., *Doe* v. *Nepean*, which is reported before the King's Bench, 5 B. & Ad. 86, and before the Exchequer Chamber, 2 M. & W. 894. In that case the lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. Knight went to America. The last account that was heard of him was by a letter written by him from Charleston, and received in England in May, 1807. Ejectment was brought within twenty-five years from the date he was last heard of, and within twenty from the date of the right accruing, if he was taken to have died at the end of the seven years from 1807. The Court of King's Bench was of opinion that the lessor of the plaintiff, who gave no other evidence of Knight's death than his absence, failed in establishing that his death took place within twenty years before the ejectment brought. With reference to the argument of inconvenience, Lord Denman said:—"If, for the sake of preventing inconvenience, we were arbitrarily to lay down a rule that seven years absence abroad (the party not having been heard of) was *prima facie* evidence of his death *at the end* of the seven years, such a rule would, in the very great majority of cases, nay, in almost every case, cause the fact to be found against the truth; and, as the rule would be applicable to all cases in which the time of death became material, it would in many be productive of much inconvenience and injustice." The Exchequer Chamber adopted the doctrine of the of the Court of King's Bench in these terms—viz., "We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death. whenever it is material, must be a subject of distinct proof." It is obvious from these passages that there is an inconsistency between that which the Courts of King's Bench and Exchequer Chamber laid down, and what I have quoted from the judgment of the Vice-Chancellor Malins, as going beyond what was laid down by the Vice-Chancellor Kindersley. The Vice-Chancellor Kindersley, however, seems to have grounded his opinion on certain portions of these two judgments. There are, therefore, other parts of them which it will be desirable to quote and examine. Thus, in the Court of King's Bench it is stated, "There is no doubt that the lessor of the plaintiff must recover by the strength of his own title, and, in order to do so, must prove that he had a right to enter on the lands sought to be recovered within twenty years from the ejectment brought; and consequently, as the presumption is that a person once alive continues so until the contrary is shown, the lessor of the plaintiff is bound to prove, first, the death of Matthew Knight; and secondly, that it took place within twenty years before the ejectment brought." And in the judgment of the Exchequer Chamber the following are the material passages bearing on this part of the subject:—"The Court is called on to review the decision of the Court of King's Bench in *Doe* v. *Nepean.* The doctrine there laid down is, that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or at the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After fully considering the arguments at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I., relating to bigamy; more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, not of the *time;* it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex.* v. *Inhabitants of Harborne.* It is true the law presumes that a person shown to be alive at a given m remains alive until the contrary be shown, for which reason the *onus* of shewing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death, by proving the absence, of Matthew Knight, and his not having been heard of for seven years; whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the *onus* is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of

Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years." The Vice-Chancellor Kindersley appears to have acted on the passages in both these judgments which are to the effect that the *onus* of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown. Those passages are not essential to the conclusion arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not, and ought not to be, any such presumption of law. If there was such a presumption, it would be no ground for throwing the *onus* of proof on the plaintiffs, where seven years had elapsed from the date of the last proof of existence; on the contrary, it would carry the period of deaht. as suggested and laid down by Vice-Chancellor Malins, to the end of the seven years. But both the decisions are that it did not, and because it did not the plaintiff failed, and did not recover the property he sought. In the recent case of *The Queen* v. *Lumley*, it was held, consistently with another judgment delivered by Lord Denman in *Rex.* v. *The Inhabitants of Harborne*, 2 A. & E. 540, that there was no presumption of law in favor of the continuance of a life up to a particular period, but that it was a question for the jury as a matter of fact. The case was heard before the Chief Baron, Mr. Justice Byles, Mr. Justice Lush, Mr. Justice Brett, and Mr. Baron Cleasby; and Mr. Justice Lush delivered the judgment of the Court in these terms:—"We are of opinion that the direction to the jury in this case, viz., that, there being no circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage, was erroneous. In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is surely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceeding the second marriage the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. But the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Rex.* v. *Twyning*, *Rex.* v. *Harborne*, and *Nepean* v. *Doe*, appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage there is no question for the jury. The provision in the Act then comes into operation and exonerates the prisoner from criminal culpability, though the husband or wife be proved to have been living at the time when the second marriage was contracted. The legislature by this provision sanctions a presumption that a person who has not been heard of for seven years is dead; but the provision affords no ground for the converse proposition—viz., that where a party has been seen or heard of within seven years a presumption arises that he is still living—that, as we have said, is always a question of fact."

True it is that *The Queen* v. *Lumley* was a criminal case, and that the seven years had not elapsed from the date of the first husband having last been heard of; but, though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it cannot be that the rules of evidence in each should be so far different as that there should be a positive legal presumption in the one proceeding, and no legal presumption in the other. A prosecutor and a person seeking to recover property have each to prove his case, and in each instance the object is to arrive at, and act upon, the real truth.

Lord Denman, who delivered both judgments in *Doe* v. *Nepean*, thus expressed himself in *The King* v. *The Inhabitants of Harborne*:—"I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe* v. *Nepean* the question arose much as in *Rex.* v *Twyning*. The claimant was not barred if the party were presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption, there was nothing to be submitted to the jury. But this Court held that no legal presumption existed, and set the verdict aside. That is quite consistent with the view which we take in the present case, and *Rex.* v. *Twyning* may be explained in the same way. I am aware that in the latter case Mr. Justice Bayley founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it." Other learned judges concurred in this opinion. The notion of a legal presumption in favor of life, originated, I believe, with the civil law, and we have Sir William Grant's opinion, in *Mason* v. *Mason*, as to adopting presumptions of fact from that law. It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Doe* v. *Nepean*, and to assert, as an exception to the rule, that the *onus* of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging death at such particular period, and not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor, when Vice-Chancellor, in *Re Green's Settlement*, or with the dictum of Lord Justice Bolt when he said, in *Re Benham's Trust*, that the question was one, not of presumption, but of proof; or with the real substance of the actual decisions, or the sound parts of reasoning, in *Doe* v. *Nepean*, or with the judgments in *Rex.* v. *The Inhabitants of Harborne*, and *Reg.* v. *Lumley*, or with the principles to be deduced from the judgments in *Underwood* v. *Wing*. The true proposition is that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail. This case happens to be one of an alleged member of a class of legatees. A legatee's survivorship of a testator is requisite to clothe him with that character, is a tacit condition annexed by law to every ordinary immediate gift by will, and it follows that the representatives of a person alleged to be a legatee must prove, as against the other members of ther class who prove their survivorship, that he survived the testator, otherwise he was not a legatee at all. For these reasons, and upon a review of the authorities and the judgments on which they rest, I am opinion that there is no presumption of law as to the particular period at which Nicholas Phenè Mill died; that it is a matter of fact to be proved by evidence, and that the *onus* of proof rests on his representative. This brings me to an examination of the evidence. At the hearing a further inquiry as to the facts was offered and was declined by each of the parties. It was not admitted by the appellants that Nicholas Phenè Mill was the Nicholas Mill referred to in the communications from the American officials, but those communications were not objected to, and were read and commented on by both sides. There are three affidavits. The earliest in point of date is that of Nicholas Phené Mill's mother. She states that she is the widow of William Mill the elder; that she left England many years ago to reside abroad; that Nicholas Phené Mill was born at Ostend in the year 1829; that on the 19th of August, 1853, he left home and went to reside in America; that he wrote letters to her and her family from America; that she received from him a letter addressed from on board the United States' frigate *Roanoke*, dated the 15th August, 1858; that neither she nor, as she believes, any member of the family has heard from him since, and that she believes him to be dead. She speaks of inquiries that have been made for him. The next affidavit is that of the petitioner in the court below. He is a brother of Nicholas Phené Mill. He speaks of his brothers and sisters, and says that the last that has or can be ascertained or heard about Nicholas Phené Mill is that, being a sergeant of marines in the United States naval service, and unmarried, he deserted from the United States' frigate *Roanoke* on the 16th June, 1860. He further states that he was himself in America from August, 1858, till April, 1862; speaks of many fruitless inquiries and advertisements, and adds that his information as to Nicholas Phené Mill's desertion was derived from an official letter, written in answer to one from his solicitors to the Government authorities in America. The last affidavit is that of the clerk to the petitioner's solicitors. He speaks of letters of administration being granted to the petitioner, and proves the correspondence with the Government officials in America. There were two letters from the petitioners's solicitors; each was answered. The answer to the second was the most explicit, and the only one necessary to refer to. It is endorsed on the letter to which it is an answer, and is in these terms:—

"Navy Department, Bureau Equipment and
"Recruiting, Washington, Dec. 11, 1867.

"Nicholas Mill was a sergeant in the Marine Corps, and deserted June 16th, 1860, while on leave from New York to join the Philadelphia station. He has not been heard of from since that date. M. Smith, Chief of Bureau."

This was in answer to a letter which stated that Nicholas Phené Mill wrote to his mother on the 15th August, 1858, from on board the United States' frigate *Roanoke*, Boston Navy Yard, Massachusetts, stating that he expected to be long absent, but would write on his return from his voyage. If this correspondence is excluded, there is no other evidence than that Nicholas Phené Mill was last heard of in 1858. There would, therefore, be no sufficient evidence of his having survived the testator. Nor does the admission of the correspondence supply the necessary proof; for though I assume that the Nicholas Mill therein mentioned was the Nicholas Phené Mill who wrote from the *Roanoke*, I cannot infer from the statement of his desertion on the 16th June, 1860, that he was alive when the testator died in January, 1861. I should not do so if it was a simple statement of desertion and no more. The statement, however, is not simply that he deserted, but that he deserted while on leave from New York to join the Philadelphia station, June 16th, 1860, and has not been heard of from since that date; the reasonable conclusion from which is that he never reappeared after he went on leave; that his leave was up on or before the 16th June, 1860; and that being so his name was on the books as a deserter. If I am to draw a conclusion at all, I should infer that a person in the position of a sergeant having nothing against his character would not desert, and that he had died while on leave, and so was not heard of by the authorities. It is enough, however, for me to state that, in my opinion, the burden of proof is on the representative of Nicholas Phené Mill, and that he has not proved affirmatively that Nicholas Phené Mill survived the testator—a proof which I consider essential to his title. The order of the Vice-Chancellor must, therefore, be discharged.

# DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

### FOR AUGUST, SEPTEMBER AND OCTOBER, 1869.

*(Continued from Vol. VI. page 82.)*

JURISDICTION—*See* FOREIGN GOVERNMENT.

LANDLORD AND TENANT.

In 1860, A. made a lease to B., who covenanted therein not to assign or part with the possession of the premises without A.'s written consent, and there was a re-entry clause. In 1865, B. with A.'s written assent to the transfer on the old terms, sold to C., and let him into possession without a formal assignment. In 1867, C., with A.'s written assent, assigned the term to trustees for creditors. The trustees sold to defendant, who took possession. *Held*, that there had been no forfeiture. There was never an assignee of the whole term, so as to be subject to the covenants in the lease, and B.'s covenant was not broken by letting C. into possession as he did, nor by the transfer by the trustees to defendant.—*West* v. *Dobb*, L. R. 4 Q. B. 634.

*See* COVENANT, 2.

LAW OF NATIONS—*See* FOREIGN GOVERNMENTS.

LEASE—*See* COVENANT, 2; LANDLORD AND TENANT.

LEGACY.

1. A testator gave to his wife "any money that I may die possessed of, or which may be due and owing to me at the time of my decease." He had insured his own life. *Held*, that the debt accruing under the policy at his death passed by the above bequest.—*Petty* v. *Willson*, L. R. 4 Ch. 574.

2. Bequest to A. and B. as tenants in common, "and their respective heirs or representatives." A. died before the testator. *Held*, that A.'s share lapsed. The words were words of limitation.—*Appleton* v. *Rowley*, L. R. 8 Eq. 139.

3. A contingent legacy which is given to an infant, and which, or the income of which, the executors are empowered to apply for his maintenance, or education, or benefit during minority, as they shall think proper, carries interest from the death of the testator, although he may not have stood *in loco parentis* to the infant.—*In re Richards*, L. R. 8 Eq. 119.

*See* POWER; WILL, 5.

LEX LOCI—*See* FOREIGN GOVERNMENT.

LIBEL.

To charge A. in the newspaper with ingratitude in politically opposing B., and to allege that at a past time A. was in pecuniary straits, and was aided by B., and had since paid his debts, as the only support of the charge, is libellous.—*Cox* v. *Lee*, L. R. 4 Ex. 284.

LIEN.

A policy of insurance was assigned by A. to B. as a security for a judgment debt due from A. to B., on which B. had created a charge in favor of C. The premiums were paid by B. during his life, and after his death by his administrator, at first of his own authority, and afterwards by the direction of the court in an administration suit. *Held*, that, as against C., the administrator of B. had a lien upon the money payable under the policy for the premiums paid by him, but not for those paid by B.—*Norris* v. *Caledonian Insurance Co.*, L. R. 8 Eq. 127.

*See* VENDOR AND PURCHASER OF REAL ESTATE.

MARRIAGE—*See* REVOCATION OF WILL.

MARRIED WOMAN—*See* WIFE'S EQUITY.

MARSHALLING OF ASSETS—*See* MORTGAGE, 2.

MASTER AND SERVANT.

Defendant sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles. Instead of returning directly, as was his duty, the carman, when about a quarter of a mile from the defendant's offices, drove off in another direction on business of the clerk's; and, while he was thus driving, negligently ran over the plaintiff. *Held*, that defendant was not liable.—*Storey* v. *Ashton*, L. R. 4 Q. B. 476.

MISTAKE—*See* SPECIFIC PERFORMANCE, 2.

MONEY HAD AND RECEIVED.

The defendant received money for a married woman, and wrote to her that he held it at her disposal. The wife died, and then the husband, (who had not interfered in the matter,) and the wife's administratrix sued the defendant for money had and received to the use of the wife. *Held* (KELLEY, C. B., *dissentiente*), that the action could be maintained, and by the wife's representative (Exch. Ch.)—*Fleet* v. *Perrins*, L. R. 4 Q. B. 500; s. c. L. R. 3 Q. B. 536; 3 Am. L. Rev. 273.

*See* BANKRUPTCY, 1.

MORTGAGE.

1. A mortgagee is bound to convey the legal estate in the mortgaged property, and to deliver up the title deeds, to a person from whom he has accepted a tender of his principal, interest, and costs, although such person may have only a partial interest in the equity of redemption.—*Pearce* v. *Morris*, L. R. 8 Eq. 217.

2. A party entitled to funds A. and B. made

three mortgages: (1) of A. and B.; (2) of A. only; (3) of the surplus of both funds after payment of 1 and 2. Fund A. was absorbed in paying mortgage 1. *Held*, that fund B. must be applied in satisfaction of mortgage 2 in full, in priority to mortgage 3.—*In re Mower's Trusts*, L R. 8. Eq. 110.

3. A second mortgagee, with notice of a prior mortgage to secure a sum and future advances, is not affected by advances made by the first mortgagees after they have notice of the second mortgage.

The mortgagor was a publican, the first mortgagee a brewer, the second a distiller. A contrary custom was alleged in such cases. *Held*, that it was not proved, and was bad for want of mutuality and defined limits.—*Daun* v. *City of London Brewery Co.*, L. R. 8 Eq. 155.

*See* Fixture; Lien; Trust.

Mutual Credits—*See* Bankruptcy, 2, 3.

Navigable Water—*See* Statute.

Negligence.

1. A bank received gratuitously a box of which the owner kept the key. The box was placed in the outer of three strong rooms, together with other customers' boxes and much property of the bank. The cashier of the bank had access to this room and abstracted some of the contents of said box. After this was discovered some further precautions were taken by the bank. *Held*, that there was no evidence on which the jury could properly find that the bank was wanting in ordinary care.—*Giblin* v. *McMullen*, L. R. 2 P. C. 317.

2. The plaintiff on getting into a railway carriage, having a parcel in his right hand, placed his left hand on the back of the open door to aid him in mounting the step. It was after dark, and he could see no handle, if there was one. The guard, without warning, slammed the door, throwing the plaintiff forward and crushing his hand between the door and door-post. *Held*, that the defendants were not entitled to a nonsuit. The jury were justified in finding that the guard was negligent and that the plaintiff was not. (Exch. Ch.)—*Fordham* v. *Brighton Railway Co.*, L. R. 4 C. P. 619; s. c. L. R. 3 C. P. 368; 3 Am. L. Rev. 105.

*See* Master and Servant.

Notice—*See* Cheque.

Novation.

A. advanced money to B., with which to build a railway; then B. transferred his business to C. and afterwards gave his note to A. for the above money, A. writing that he looked to B. and knew nothing of C. in the matter. C. had the benefit of A.'s advance. A year afterwards, A. applied to C. for a year's interest, which C. paid, and sent to A., B.'s cheque for the sum remaining to his credit, directing A. to place it to the credit of C. *Held*, that C. had not become debtor to A. in B.'s place, and that A. could not prove against C.'s estate.—*In re Smith, Knight & Co.*, L. R. 4 Ch. 662.

Parliament.

Members of either House of Parliament are not criminally liable for a conspiracy to make statements which they know to be false, in the House, to the injury of a third person.—*Ex parte Wason*, L. R. 4 Q B. 578.

Partnership—*See* Company, 2; Tenancy in Common.

Patent.

A. filed a provisional specification and obtained provisional protection. B. afterwards did the like and obtained a patent for a similar invention within the period of A.'s provisional protection. A. then petitioned for a patent dated as of the date of his provisional protection. *Held*, that A. could only have a patent for such part of his invention as was not covered by B.'s patent, to be dated with the actual date of the petition.—*Ex parte Bates & Redgate*, L. R. 4 Ch. 577.

*See* Discovery.

Payment—*See* Principal and Agent.

Perils of the Sea—*See* Insurance, 3.

Perpetuity.

1. A power coupled with a term for five hundred years given to trustees to enter and manage an estate during the minority of successive tenants in tail, for life, in tail, again for life, and so on, is void for remoteness, although all the tenants for life are *in esse*.—*Floyer* v. *Bankes*, L. R. 8 Eq. 115.

2. A., having a power under her marriage settlement to appoint a fund in favor of the children of the marriage, appointed part of the fund by will to her son C. for life, with remainder to such persons as he should by will appoint. There was a general residuary appointment of the fund, subject to all other appointments of the same, to A.'s daughters, to whom A. left other property also. *Held*, that the appointment to C.'s appointees was too remote, and that A.'s daughters took that part of the fund; also that said daughters were not put to their election.—*Wollaston* v. *King*, L. R. 8 Eq. 165.

Pilot—*See* Collision.

Pleading.

1. To a declaration on a bill of exchange by the drawer and payee, the defendant pleaded that he accepted the bill on the condition agreed on by him and the plaintiff as part of the consideration for the bill; viz., that in a certain event which had occurred, the plaintiff would renew the bill. *Held*, on demurrer, that the plea must be taken as alleging a written agreement, and was therefore good.—*Young* v. *Austen*, L. R. 4 C. P. 552.

2. Action on an award adjudging the price to be paid for shares in a bank which the plaintiff had elected, under 25 & 26 Vic. c. 89, s. 161, to have purchased by the bank before it was voluntarily wound up and its business transferred to another company. Equitable plea, that plaintiff in consideration, &c., promised to consent to the winding up, &c., and to exchange his shares for shares in the new concern. *Held*, that the plea was bad. The defendant's remedy, if any, was a cross action for breach of contract.—*DeRosaz* v. *Anglo-Italian Bank*, L. R. 4 Q. B. 462.

Pledge—*See* Foreign Government.

Power.

A testatrix, having a general power of appointment over sums of money, gave pecuniary legacies followed by a bequest of the residue of her property. *Held*, that the legacies as well as the residuary bequest operated as appointments under the power, under 1 Vict. c. 26, s. 27.—*In re Wilkinson*, L. R. 4 Ch. 587.

*See* Perpetuity; Revocation of Will.

Practice—*See* Costs; Production of Documents.

Principal and Agent.

The defendant, A., having purchased copyhold land, was admitted by C., who had acted as his attorney in completing the purchase, and had been appointed by the steward of the manor as his deputy for that turn to admit A. Nine days afterwards A. gave C. a cheque on A.'s bankers for a sum including the lord's fine, steward's fees, and C.'s charges as A.'s attorney. A. crossed the cheque at C.'s request to C.'s bankers. The amount of the cheque was paid by A.'s bankers to C.'s bankers, who retained the money for a debt due to them from C. The lord sued A. for the fine. *Held* (*per* Bovill, C.J., & Montague Smith, J., Byles, J., *dissentiente*), that if C. had power to receive the fine, he could only receive it in cash or the equivalent of cash, which might be handed over as it was received to the lord; and that as against the lord the crossed cheque for a large sum was no payment.—*Bridges* v. *Garrett*, L. R. 4 C. P. 580.

*See* Company, 2; Master and Servant; Sale; Specific Performance, 1.

Priority—*See* Mortgage, 2, 3.

Privilege—*See* Parliament.

Privileged Communication—*See* Production of Documents.

Production of Documents.

In an action against a railway company for a personal injury sustained by a passenger on their railway, the court allowed inspection of communications made by agents of the company in the ordinary course of their duty, to inform the company on the subject, whether made before or after litigation was begun, the same not being made confidentially with a view to litigation; those made with such a view are privileged.—*Woolley* v. *North London Railway Co.*, L. R. 4 C. P. 602.

Promissory Note—*See* Bills and Notes.

Proximate Cause—*See* Insurance, 3.

Railway—*See* Negligence, 2; Production of Documents.

Recoupment—*See* Tenant for Life and Remainder-man.

Representation—*See* Contract.

Restraint of Trade—*See* Benefit Society; Covenant, 1.

Revocation of Will.

By the will of A. a power was given to B. to appoint by will, and in default of her appointment, the property was to go to the persons who at her decease should be her "next of kin." B. appointed by will to C. and afterwards married him. C. died in B.'s lifetime. *Held*, that the above words "next of kin" did not imply the same class as under the Statute of Distribution, and that therefore the will was not revoked. 1 Vict. c. 26, s. 18.—*Goods of McVicar*, L. R. 1 P. & D. 671.

*See* Codicil; Will, 3.

Sale.

The plaintiff, in England, sent an order to P., in Brazil, to buy cotton for him. P. bought cotton, and shipped it in the defendant's vessel; the invoice was made out as shipped on account and risk of the plaintiff, but the bill of lading was taken deliverable to P.'s order or assigns. P. wrote to the plaintiff, advising the shipment and saying, "Enclosed please find invoice and bill of lading; we have drawn upon you for the amount in favor of our agents, to which we beg your protection." The invoice was enclosed, but the bill of lading, indorsed in blank by P., was sent with the bill of exchange to P.'s agent in England. The agent sent the two documents to the plaintiff, who retained the bill of lading, but returned the bill of exchange unaccepted, on the ground that P. had not complied with his order. The plaintiff presented the bill of lading to the defendant, but he, being advised by P.'s agent, refused to deliver the cotton. On a case stated, the court having power to draw inferences of fact: *Held* (Cleasby, B., *dubitante*), that P.'s intention was, that the bill of lading should not be handed over until the bill of exchange was accepted; that no property, therefore, passed to the plaintiff, and the defendant's refusal was right. (Exch. Ch.)—*Shepherd* v. *Harrison*, L. R. 4 Q B. 493; s. c. *ib.* 196; 8 Am. L. Rev. 713, 714.

Seal—*See* Company, 1.

Set-off—*See* Bankruptcy, 2, 3.

Settlement—*See* Wife's Equity.

Ship—*See* Admiralty; Collision; Insurance, 2, 4.

Slander—*See* Libel.

Specific Performance.

1. In a bill filed by a purchaser for specific performance of a contract to sell land, it was alleged that the defendant P. informed the plaintiff that a written agreement was executed, and "that P. entered into the said agreement . . . as the agent for" the plaintiff, but that P. refused to give the plaintiff the benefit of the contract. It appeared by the bill that the agent was appointed orally. Demurrers by the two defendants, the agent and the vendor, were overruled. A written contract was sufficiently alleged, and would be enforced, although there was no written appointment of the agent.—*Heard* v. *Pilley*, L. R. 4 Ch. 548.

2. The whole of an estate, except a small plot, was put up for sale in lots, subject to the restriction that no public house should be built upon "the property." In the particulars of sale the property was described as the M. estate, and in the plan annexed, all the lots were colored, but the excepted plot was uncolored like the lands of adjoining owners, though, unlike them, it was not marked with the owner's name. There was nothing else to show that the vendor owned said plot. It was improbable that a public house would be built on any of the adjoining estates. A suit for specific performance was brought against one who had purchased a lot within a hundred yards of the excepted plot, believing that the whole of the vendor's estate was included in the particulars, and so would be subject to the restriction. *Held*, that the vendor could only compel it on entering into a restrictive covenant as to the excepted plot.—*Baskcomb* v. *Beckwith*, L. R. 8. Eq. 100.

Stamp.

1. S. agreed by writing to become a member of a mutual insurance company in respect of an insurance for £800 on his own ship; but no stamped policy was ever executed. He paid a call for losses of other members, and made a claim for a loss of his own, but before it was paid the association was ordered to be wound up. *Held*, that S. was not a contributory. The contract was invalid for want of a stamp under 35 Geo. III. c. 63.—*In re London Marine Insurance Association*, L. R. 4 Ch. 611.

2. A., a married woman, was next of kin to one who died domiciled in England, intestate, and leaving personal property there. A.'s husband, B., did not reduce said property to possession in A.'s life, and after A.'s death did not take out administration to her. A. and B. were always domiciled in America, and died leaving a child, C., there. C. empowered D., in England, to take out administration for him. D. took out one to C.'s father, B., and one to A. *Held*, that this was right, and that a stamp duty was payable on each. Lord Westbury *diss.* on the ground that by the law of A.'s domicile, of which the court were bound to take notice, it would have been sufficient to take one out to A.

When interest is recoverable by the letters of administration it is chargeable with duty under 55 Geo. III. c. 184.—*Partington* v. *Attorney-General*, L. R. 4 H. L. 100.

Statute.

The defendants being empowered by a private act of Parliament to render navigable the River B., in doing so erected staunches therein, which, together with weeds, caused silt to accumulate, and thus caused the river to overflow the plaintiff's bank. The weeds might have been cut, or the silt dredged so as to prevent this. *Held*, that, as neither cutting nor dredging was shown to be necessary for purposes of navigation, and no negligence was proved, defendants were not liable.—*Cracknell* v. *Mayor of Thetford*, L. R. 4 C. P. 629.

*See* Bankruptcy, 1–3; Codicil; Collision; Fraudulent Conveyance; Insurance, 1; Patent; Revocation of Will; Stamp, 1; Voter.

Statute of Frauds—*See* Specific Performance, 1.

Tenancy in Common.

Co-owners of lands worked a quarry on part of them, and let the rest to agricultural tenants. Other lands were purchased from time to time out of the profits and for the purposes of the quarry, and were conveyed in fourteen cases in trust for said co-owners, in ten cases without any trusts declared. One of the co-owners, a woman, married, and her share was settled, being treated as real estate, to her separate use for life, remainder to her husband for life, &c. Afterwards other lands were purchased, as above, without any trusts declared. *Held*, that the latter lands must be taken to have been held on like trusts with the former, and that said woman's share passed as real estate to her heirs; also that the husband took no interest by the settlement in the after-acquired lands.—*Steward* v. *Blakeway*, L. R. 4 Ch. 603; s. c. L. R. 6 Eq. 479, 3 Am. L. Rev. 717, 718.

TENANT FOR LIFE AND REMAINDER-MAN.

Where during the minority of a tenant for life part of the income has been expended under the order of the court in improving the estate, although the order was made in the presence of remainder-men, and was expressed to be without prejudice to the right of the tenant for life to have the amounts so expended recouped out of the *corpus* of the estate, and although the tenant for life die an infant, there cannot be such a recoupment.—*Floyer* v. *Bankes*, L. R. 8 Eq. 115.

TROVER—*See* BANKRUPTCY, 1.

TRUST.

A woman conveyed land to her sons in trust for her children for life, remainder to her grandchildren. After giving large powers of management and powers of sale to the trustees, the deed provided that any child advancing money to the settlor should have a charge by way of mortgage on the land, and any child paying off any part of an outstanding mortgage on said land should stand in the place of the mortgagee for the sum so paid. One of the trustees advanced large sums to the settlor and paid part of the mortgage debt. *Held*, that he was only entitled to a sale and not to a foreclosure; both by the construction of the deed and because he was trustee as well as mortgagee. *Held*, also, that he could not bid at the sale against the objection of some of the *cestuis que trust*. Perhaps if no purchaser at an adequate price could be found, the trustee might purchase under proposals to the court. *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

*See* CONTRACT; CURTESY; EQUITABLE ASSIGNMENT; WILL, 5.

VENDOR AND PURCHASER OF REAL ESTATE.

A purchaser of real estate upon a sale by the court was kept out of possession for a year by the plaintiff in the cause, who was himself in occupation of the estate. He was then let into possession by virtue of a writ of assistance issued by the court. The plaintiff became bankrupt. *Held*, that the purchaser was entitled to have paid to him out of the purchase-money in court; (1) the costs ordered to be paid him by the plaintiff by the orders for said writ; (2) an occupation rent for the time during which he was kept out of possession; (3) compensation for deterioration of the property during the same period; (4) arrears of tithes which he had been compelled to pay.—*Thomas* v. *Buxton*, L. R 8 Eq. 120.

*See* SPECIFIC PERFORMANCE.

VOTER.

By 30 & 31 Vict. c. 102, s. 3, every "man" having certain qualifications and not subject to any legal incapacity is entitled to the franchise. By a previous act, 13 & 14 Vict c. 21, s. 4, "in all Acts, words importing the masculine gender shall be deemed and taken to include females, . . . unless the contrary . . . is expressly provided." *Held*, that women could not vote for members of parliament under the first-mentioned act: (1) because subject to a legal incapacity; (2) because the word "man" in said act does not include women.—*Chorlton* v. *Lings*, L. R. 4 C. P. 374; *Chorlton* v. *Kessler*, *ib.* 397.

WARRANTY.—*See* INSURANCE, 3.

WIFE'S EQUITY.

A married woman wrote out an assignment to her husband of her reversionary interest in a trust fund, dating it before her marriage and signing it in her maiden name. She did so to enable him to borrow money upon it, and moved thereto, as she alleged, by his threats. He sold said interest, and before completion, about six months after signing the above paper, she signed and gave to the purchasers a letter to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the same to her husband. The latter was at this time in prison. *Held*, that she had been guilty of a fraud which precluded her from claiming her equity to a settlement against the purchasers.—*In re Lush's Trusts*, L. R. 4 Ch. 591.

WILL.

1. A will was witnessed by an attorney and his clerk. After the testator's death an affidavit was written out by the clerk and sworn to by the attorney, that, *inter alia*, the wit-

ness signed in the presence of the testator. After the attorney's death the clerk for the first time stated and testified that the witnesses did not sign in testator's presence. The court declined under the circumstances to set aside the will on the clerk's recollection, alone.—*Wright* v. *Rogers*, L. R. 1 P. & D. 678.

2. The deceased wrote on the back of his will, which was not duly executed, a document headed "2 codicil." This document was properly executed, according to the law of the country where it was made, but could not by that law stand apart from, or establish, the will. *Held*, that neither will nor codicil could be admitted to probate.—*Pechell* v. *Hilderley*, L. R. 1 P. & D. 673.

3. Deceased at the foot of his will wrote: "This my last will and testament is hereby cancelled, and as yet I have made no other," signed this in presence of two witnesses who attested the execution. Administration was granted with the memorandum annexed.—*Goods of Hicks*, L. R. 1 P. & D. 683.

4. If a testator of sound mind reads a will and then signs it, the presumption that he understood it is conclusive.—*Atter* v. *Atkinson*, L. R. 1 P. & D. 665.

5. A party gave personalty to his son T., by will, subject to legacies thereinafter given, and then gave legacies to his daughters A. and E. He next devised his real estate to T. and appointed him sole executor, and directed that A. should reside with and be maintained by T. so long as A. should remain unmarried. A., after living for a time with T., left of her own accord and resided elsewhere. *Held*, that A. was only entitled to be maintained by T. during his life and while she resided with him, T. being always willing that she should do so. *Wilson* v. *Bell*, L. R. 4 Ch. 581.

*See* Codicil; Legacy; Perpetuity, 2; Power; Revocation of Will.

Witness—*See* Will, 1.

Words.

"*As damages*"—*See* Insurance, 4.

"*Man*"—*See* Voter.

"*Money due me at the time of my decease*"—*See* Legacy, 1.

"*Next of Kin*"—*See* Revocation of Will.

"*Perils of the Sea*"—*See* Insurance, 3.

"*Person in Charge*"—*See* Collision.

"*Port of Loading*"—*See* Insurance, 2.

"*Under Way*"—*See* Admiralty.

"*Warren of Conies*"—*See* Deed.

## REVIEWS.

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Law Magazine and Law Review. London: Butterworths, February, 1870.

The contents for this number are: Life Assurance; the City Courts; Exemption of Private Property on the Ocean; the Land Question; the Charters of the City of London; the New Bankruptcy Act; Slander; the Law of Limitation; Trades-Union Legislation; the Works of George Coode; the French Bar; Sanitary Law; also the usual notices of New Books, Events of the Quarter, &c.

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A Report of the Case of The Queen v. Gurney and others in the Court of Queen's Bench, with an Introduction containing a History of the Case. By W. C. Finlason, Esq., Barrister-at-Law, Editor of Crown and Nisi Prius Reports, &c. London: Stevens & Haynes, 11 Bell Yard, Temple Bar, 1870.

It is well that a report of this celebrated trial which has attracted so much attention should be preserved. The questions raised were such as may be raised any day in commercial life. The respectability of the accused and the seriousness of the charge gave to the case an extraordinary interest. But the more one reads of it the greater is the surprise that the mayor of London ever committed the accused for trial; though it is still a greater wonder that an intelligent Grand Jury found a true bill. No fraud was shown from first to last; indeed there was not even misrepresentation. In equity it may be difficult to draw the line between exaggerated praise and equitable fraud; but at law there can be no criminal raud unless there be misrepresentation or deceit. There was nothing in the case to shew the absence of *bona fides*. On the contrary, the conduct of the accused throughout went to shew entire good faith; there was scarcely even suspicion. Those who took stock in the venture and lost were in a humour to see proof of guilt where there was at most suspicion. Their number was so great that the commercial community of the metropolis was much convulsed; and this caused that outside pressure which is so dangerous to the fair administration of justice, and which unperceptibly affected both the committing justice and the Grand Jury. Had there been a responsible public prosecutor there never would have been a prosecution. The facts which transpired at the trial and which are succinctly given by Mr. Finlason in his introduction to the report, entirely fail to bring home criminalty to any of the accused. Mr. Finlason's dissertation on the law governing the case is valuable, and his industry is indefatigable. The volume contains 270 pages, and more than one-third of the book is occupied by the Editor in a review of the cases showing what is and what is not commercial fraud cases at law, cases in equity and cases in bankruptcy are all made to do tribute. In addition to this summing up of the learned Chief Justice, revised by himself, gives much additional value to the work. The report should be in the possession, not merely of members of the legal profession concerned in the administration of commercial law, but of Bankers, Directors of Joint Stock Companies, and others who, from time to time, are called upon to make annual reports to Shareholders of their doings. In documents of the kind there is more or less of a tendency to the bright side. When this tendency is so strong as to lead to a wilful misrepresentation of facts, and persons are thereby deceived, the criminal law may be invoked with success.

## OBITUARY.

### THOMAS KIRKPATRICK, Esq., Q. C.

Thomas Kirkpatrick, Esq., Q.C., the Member of the Dominion Parliament for Frontenac, died at his residence in Kingston, on Saturday, the 26th March.

Mr. Kirkpatrick was born in Ireland, at Coolmine, near Dublin, in the year 1805, and was therefore in his sixty-fifth year at the time of his death. He was educated at Trinity College, Dublin. In 1823, he came to this country, and immediately afterwards commenced the study of the law in the office of the late Judge Hagerman. He was admitted as an attorney and called to the Bar in 1828, and commenced the practice of his profession in the city of Kingston. He at the same time held the office of Collector of Customs at Kingston, to which he was appointed on the elevation of Mr. Hagerman, the former Collector, to the Bench. Such combinations as these, which, strange as it would seem now, often occurred in those days. In 1844 an Act of Parliament was passed, which compelled him to resign either this office or his profession, and he chose the former alternative. In 1846, he was made a Queen's Counsel, at the same time as Hon. J. H. Cameron, Sir Henry Smith, and the present Minister of Justice, Sir John A. Macdonald. In 1857, he was appointed a Commissioner to settle the boundary line between Upper and Lower Canada; and in 1860, he was appointed one of the Provincial Arbitrators, Col. VanKoughnet and Hon. Mr. Morin being the others.

In politics he was a Conservative, and in 1867, was elected to represent the County of Frontenac in the Dominion Parliament. He was defeated, however, in 1858, by the Hon. Alex. Campbell, in a contest for the Cataraqui Division.

Mr. Kirkpatrick married in 1838 a daughter of Alexander Fisher, Esq., Judge of the Midland District, by whom he had five sons and two daughters, who survive him. He was greatly respected by all who knew him, as a citizen, as a lawyer, and in the various ways in which he appeared before the public. In private life he was beloved, and his death will leave a blank in the old city of Kingston which will not soon be filled up.

### THE HON. M. H. FOLEY.

The Hon. Michael Hamilton Foley died suddenly at Simcoe, in the County of Norfolk, on the 8th instant.

Mr. Foley was born in Sligo, in Ireland, in 1819, and came to Canada in 1832. He commenced life as a schoolmaster, and subsequently edited several papers in the Reform interest. He was for some years a prominent politician, and was Postmaster General in the Brown-Dorion administration in 1858, and again in 1862.

Mr. Foley was admitted as an Attorney in May, 1851, and was called to the bar in 1864. Of late years he practised his profession in the Town of Simcoe.

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Curious Tenures.—Middleton Cheney, or Chenduit.—It is the custom in summer to strew the floor of this Church with hay cut from Ash Meadow, and in Winter straw is found at the expense of the Rector. A peculiar tenure also prevails in the lordship of this parish; when estates descend in the female line, the elder sister inherits by law.—*Oxford Journal.*

## DIARY FOR MAY.

1. SUN. *2nd Sun. aft. Easter. St. Philip & St. James.*
8. SUN. *3rd Sunday after Easter.*
13. Fri.. Exam. of Law Students for call to the Bar.
14. Sat.. Exam. of Articled Clerks for certificate of fitness.
15. SUN. *4th Sunday after Easter.*
16. Mon. Easter Term begins.
18. Wed. Last day for service for Co. Ct. York. Interim Exam. of Law Students and Articled Clerks.
20. Fri.. Paper Day, Q. B. New Trial Day, Common P.
21. Sat.. Paper Day, C. P. New Trial Day, Queen's B.
22. SUN. *Rogation.*
23. Mon. Paper Day, Q. B. New Trial Day, Common P.
24. Tues. Paper Day, C. P. New Trial Day, Queen's B.
25. Wed· Paper Day, Q. B. New Trial Day, Common P.
26. Thur. *Ascension.* Paper Day, Common Pleas.
27. Fri.. New Trial Day, Queen's Bench.
28. Sat... Declare for County Court.
29. SUN. *1st Sunday after Ascension.*
30. Mon.. Paper day, Q. B. New Trial Day, Common P.
31. Tues. Paper Day, C. P. New Trial Day, Queen's B.

THE

The Canada Law Journal.

MAY, 1870.

## THE MINISTER OF JUSTICE.

With mingled feelings of grief and hope, we allude to the painful and alarming illness which has prostrated for a time at least, Sir John A. Macdonald, the Minister of Justice. Grief, that one so eminent and so endeared to all who know him personally should suffer so much pain, and that the country should, at the present crisis especially, lose the services of one who has for so many years devoted his amazing talent with untiring industry to the arduous duties which devolve upon him—and hope, that he may yet recover from the illness which has brought him to the verge of the grave.

The attack came upon him in the midst of his work, the thought of which never leaves his mind day or night, and this combines with the painful nature of his malady to secure to him the sympathy of those politically opposed to him, and which was on a recent occasion gracefully expressed by the leader of the opposition.

We rejoice to hear that he is slowly but steadly improving. We trust his recovery may be permanent, and that he may long be spared to a people to whom his loss would be a public calamity, and whose warmest sympathies are with him and Lady Macdonald in their present affliction.

## LEX LOCI CONTRACTUS—LEX FORI.

By D. Girouard, Esq., *Advocate, Montreal.*

*Extinctive prescription or limitation of personal actions affects the remedy, and consequently is governed by the law of the country where the suit is brought, the "Lex fori"*

A question which for many years has been, and still continues to be discussed among jurists and in courts of justice is, whether the limitation of personal actions is governed by the *lex loci contractus* or by the *lex fori*. It is true that in England and the United States the point may be considered as settled in favor of the *lex fori*, although even in those countries we see lawyers of so high a standing as Westlake and Bateman strongly defending the claim of the *lex loci contractus*. We find furthermore, in a late case of *Harris* v. *Quine*, the learned Chief Justice Cockburn inclining towards the *lex loci contractus*, although he held the *lex fori* to be the settled rule. And if to this fact be added, that on the continent of Europe the question remains as yet undecided, a review of the law on this subject may not be found uninteresting to the members of the Canadian Bar.

True it is that the legal profession in every country are familiar with the reasonings *pro* and *con*. At the same time it must be admitted that there exists no complete review of the different systems advocated throughout the commercial world. The English and American writers do not fail to produce every English and American authority, but they rarely pay to the French and continental jurists the attention and consideration which their learning deserves, and *vice versâ*. Thus, Félix, Troplong and Marcadé, even Savigny, make little or no allusion to the English and American jurisprudence; and when we refer to the English or American writers, we find that in their apprehension of the opinions of French and continental jurists, they fall into many inadvertent mistakes, sometimes into grave errors. Thus, Dr. Parsons, in his late works on Notes and Bills, affirms, upon the alleged authority of Pardessus, "that in France the limitation and prescription of the place where the contract was made would prevail, no matter where the contractor was sued," (vol. 2, p. 382); whereas Pardessus supports the *lex loci solutionis*, and in default of it, the *lex domicilii debitoris* at the time of the contract. Again, at page 383, foot note *v.*, the learned professor states it to be the opinion of Pothier that the *lex loci* and not the *lex fori* should govern, whereas Pothier never speaks of any but the *lex domicilii creditoris*. Mr. Guthrie, p. 219, in turn, says that Pardessus and Boullenois favor the *lex domicilii debitoris*, and does not notice the distinction which both these commentators make, when a place of payment is specified. Mistakes have even been committed by writers in their citation of works composed in their own language. Thus, Félix asserts that Dunod favors the *lex domicilii debitoris* at the time of the institution of the action, whereas it is the *lex domicilii debitoris* at the time of making the contract which is supported by Dunod. These examples, to which many others might be added, show the importance of a careful and detailed investigation of the subject.

To begin with our own country, I find a diversity of opinion. In a late case of *Wilson* v. *Demers*, his Honor, Mr. Justice Mondelet, held that the true rule of both the old and new French jurisprudence, which should prevail in Lower Canada, is the *lex loci contractus*, or *lex loci solutionis*.

It appears that Boullenois holds the law of the domicile of the debtor, if no place of payment be specified. "True," said Mr. Justice Mondelet, "Pothier is of a different opinion, whereupon Troplong says: 'C'est une erreur difficile à comprendre dans un jurisconsulte d'un aussi grand sens.'" Duranton, vol. 21, s. 118, as usual, without expressing his own view, replies: "Ou M. Troplong n'a pas lu avec attention le passage de Pothier, ou l'erreur qu'il lui reproche devrait être reprochée aussi à Dumoulin, qu'il cite cependant en l'approuvant."

Dunod (*Des Prescriptions*, part i. ch. 14), contends that the law of the domicile of the debtor should rule, but only of the domicile at the time of the contract..

It should be borne in mind that Boullenois does not advocate the *lex loci contractus*.

The old French jurisprudence, moreover, does not appear to concur in the opinion of Boullenois. Merlin, *Répertoire*, vo. *Prescription*, s. 1, § 3, par. 7, quotes two *arrêts* of the Parlement de Flandre, the first, of the 17th July, 1692, the second, of the 30th October, 1705, which held the law of domicile of the debtor at the time of the institution of the action to govern in case of conflict of prescriptions; and he further reports another case which originated before the code, and was decided in the same sense by the *Cour de Bruxelles*, on the 24th September, 1814. Berryer and Laurière on Duplessis, *Traité de la Prescription*, liv. 1, chap. 1, express the same view. And if to the above authorities we add the old civilians Huber and Voet, and also Merlin, who evidently wrote under the influence of the then prevailing notions on the matter, it seems that the old French Common Law does not admit the *lex loci contractus*.

It is contended that the weight of modern French authority is against the doctrine of the *lex fori*.

But what is the present opinion in France? Mr. Justice Mondelet thought it useless to recapitulate all the authorities which are to be found in France touching this point.

"Suffice it to say, with Félix, (*Droit International Privé*, vol. 1, art. 96, p. 209)," he said, "that, '*les lois romaines ont déjà consacré le principe que la matière du contrat est réglée par la loi du lieu où il a été passé.*' And when the contract is to be executed elsewhere, then it must be governed by the law of the place of execution. As he says at page 214, '*ce principe a été emprunté à la loi romaine*, 421, *de obli. et act. Elle repose sur la circonstance qu'en fixant un lieu pour l'exécution du contrat, les parties sont censées avoir voulu faire tout ce que prescrivent les lois du même lieu.*'

"It is true that Merlin (*Quest. de Droit* vo. *Prescription*) expresses the opinion that the *lex fori* or that of the domicile of the debtor, will govern a case like the present, but as he has failed to take into account the circumstances of a debt being due and payable in a particular place, and as he speaks of a debt made payable generally, we have to refer to those writers who have not omitted the distinction between the one and the other case. Boullenois, t. 1, pp. 530; 2, 488, and Pardessus, Droit Comm., No. 1495,(*) clearly draw the distinction, and hold that when the contract is to be executed in a particular place, it is the law of that place which is to govern. Félix cites as holding that opinion, Christin, Burgundus, Mantica and Favre.

"On reviewing most of those writers, one finds, especially with Savigny, that the true doctrine is that the prescription of the place of payment must govern, and where the place of payment is not specified, then that of the place where the contract was created. We may join *Troplong* with the others, for he says: '*L'action personnelle*

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(*) Pardessus does not entirely agree with Boullenois as will be seen hereafter.

*se prescrit par la loi en vigueur au lieu où doit se faire le paiement.*' True, Pothier is of a different opinion, whereupon Troplong says: '*Pothier est le seul qui soutienne que la prescription est réglée par le cas du domicile du créancier, mais c' est une erreur difficile à comprendre dans un jurisconsulte d' un aussi grand sens.*' (Prescription, No. 88.) Pardessus, Droit Comm., t. 6, art. 1495, p. 883, is very explicit on that point: '*Ainsi lorsqu' un débiteur oppose la prescription, le droit d'user de ce moyen, et la durée de cette prescription, seront réglés par le droit du lieu où il a promis de payer.*'"

On reference to Pardessus, *Droit Commercial*, t. 6, p. 888, we find that his language has not been quoted in full, for there the sentence contains these words, immediately after those quoted: "et s' il ne l' a pas déterminé, par celiu du domicile qu' avait ce débiteur lorsqu' il s' est obligé; *parceque la prescription étant une exception qu' il est permis au débiteur d' opposer à la demande de son créancier, c' est naturellement dans sa propre legislation qu' il doit trouvor ce secours.*" If the debtor is thus to look only to the law of his own domicile, and if his plea of prescription affects merely the remedy, as admitted by Pardessus,—what has the law of the place of payment, or of the domicile of the debtor at the time of the contract, to do with the case? Nothing; it seems clear that the reasoning of Pardessus should lead to the opposite conclusion, to wit, the *lex fori* or *lex domicilii debitoris*, at the time of the institution of the action; and it is remarkable that two years before the publication of his *Droit Commercial*, he had, in his *Eléments de Jurisprudence Commerciale*, pronounced in an unqualified manner for the latter opinion. He says (page 112), "Le Commerce etendant con empire sur un grand nombre de contrées soumises à des législations différentes, il est important de connoitre par quelle loi le droit d' opposer la prescription, sa durée et ses conditions, doivent être détérmines. *Ce ne peut être par celle du lieu où la convention à été faite*, en la prenant, conformemént aux art. 1159 et 1160 du Code Napeleon, pour supplément naturel de ce que les parties n' auraient pas exprimé asseze clairement, parceque la prescription qui n' est pas acquise ne peut jamais, aux termes de l' article 2220 du méme code, étre l' objet d'une stipulation. Ce ne doit pas étre par la loi du domicile du demandeur, parceque c' est contre lui que la prescription est etablie, et qu' elle est une exception à son action. *C' est donc par la loi du domicile réel* ou élu du défendeur, parceque toute action relative au commerce est mobilière et personnelle, *et que la prescription qui a pour objet de protéger le débiteur et de lui offrir une barrière contre les, poursuites de son créancier, ne peut dériver d'une antre loi que de celle du domicile de ce débiteur.*"

Evidently, the opinion of the learned judge rests principally upon the rule, *locus regit actum*, and the alleged authority of Félix and of the civilians he has referred to. It is astonishing that the learned judge did not quote from Félix a few pages farther on. Félix lays down various exceptions to the rule *locus regit actum*, and among others, the case of limitation of personal actions. He contends that the law of domicile of the debtor at the time of the action should be the criterion, without paying any regard to the place of payment. Félix further declares that the *lex loci solutionis* is favored only by Boullenois, Pardessus and Troplong among the French writers, and by Christin, Burgundus, Mantica and Favre among the civilians.[*]

"Lorsqu'il s'agit," says Félix, "non pas de statuer sur le fond de la demande, mais d'apprécier des *défenses*[†] qui y sont opposées, et qui ont leur base dans le lieu où siége le tribunal saisi de la cause, on suivra cette dernière loi.

"Cette méme exception trouve son application à la prescrption extinctive. 'La loi,' dit Merlin, qui déclare une dette prescrite, n'anéantit pas le, droit du créancier en soi, elle ne fait qu'opposer une barrière à ses poursuites. Or, cette barrière, à qui appartient-il de l'établir? C'est, sans contredit, à la loi qui protége le débiteur, et par conséquent à la loi de son domicile.' Ainsi la prescription se règle par la loi du domicile qu'a le débiteur au moment de la demande. Telle est aussi l'opinion de Jean Voet, de Dunod et de Boullenois.[‡] Ce dernier auteur, ainsi que, après lui, M. Pardessus, limitent cette décision au cas où les parties n'ont pas déterminé un lieu pour l'exécution du contrat; si cette détermination a été faite, Boullenois et M. Pardessus veulent que la prescription soit régie par la loi de ce lieu. Christin, Burgundus, Mantica, Favre et Troplong réglent aussi la prescription par les lois du lieu où l'obligation doit être exécutée. Suivant Pau,

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[*] We will see hereafter that Pardessus does not fully agree with Troplong.

[†] On sait que les *défenses* ne tendent pas, comme les exceptions, à écarter simplement l'action, à la neutraliser, à différer ses effets, mais à la détruire, à l'anéantir sans retour. *V* Boncenne *Théorie de la Procédure*, vol. III, p. 162. Félix's note.

[‡] Boullenois and Dunod do not fully agree.

Voet, Huber, Hommel, Weber, Tittmann, Meier, Glück, Mittermaier, Muhlenbruch, de Lindel Kent, Story, Burge, et un arrêt de la Chambre des Lords d'Angleterre, la prescription est régie par la loi du lieu où l'action est formée. *Bien qu'il y ait quelques différences dans les termes employés par ces auteurs, on voit qu'ils aboutissent tous à cette conclusion que la prescription s'acquiert d'après la loi en vigueur au lieu où siége le juge compétent, pour statuer sur les actions personnelles formées contre celui qui oppose cette défense.* Jean Voet s'exprime ainsi sur ce point: 'Une dette non encore recouvrée est placée sous la puissance du juge du domicile du débiteur, plutôt que sous la puissance du juge du domicile du créancier, car le créancier est obligé de s'adresser au tribunal compétent du débiteur. Ainsi ce n'est pas le juge du domicile du créancier, mais celui du domicile du débiteur qui peut repousser la demande en paiement'

"La Cour d'Appel de Cologne (arrêts des 7 janvier 1836, 4 avril 1839 et 14 décembre 1840,) et la Cour de Cassation de Berlin, (arrêt du 8 octobre 1838) ont également jugé que la prescription extinctive d'engagements personnels est régie par la loi du domicile du débiteur.

"Quelques auteurs, cependant," Félix adds, vol. I, p. 222, "sont d'un avis contraire: Hert, Mansord, l'auteur de l'article du *American Jurist and Law Magazine*, Rocco, Reinhardt et Schaffner appliquent, quant à la prescription, la loi du lieu où l'action est née, c'est-à-dire où la convention a été formée. Cette opinion, peut-être la mieux fondée en théorie, a aussi été adoptée par la Cour Royale de Douai et par la Cour Royale de Paris."

In addition to the foregoing continental authorities we may quote Demangeat on Félix, vol. i. p. 223, note *a*, and the eminent Prussian writer, Savigny, and to these may be added the name of Massé (*Droit Commercial*, vol. i. Nos. 558-565, ed. 1861).

Demangeat though not positive, inclines for the *lex loci contractus* only:

"C'est la cinquième opinion (la loi du lieu du contrat), qui paraît prévaloir dans la jurisprudence. Aux trois arrêts cités par M. Félix, on peut en ajouter un de la Cour d'Alger, du 18 août 1848, aux termes duquel l'accepteur d'une lettre de change ne peut pas opposer la prescription de cinq ans, quand il s'est obligé dans un lieu (à Malte dans l'espèce) où de semblables obligations se prescrivent par trente ans." (Dev.-Carr., 49, 2, 264.)

Savigny (Conflict of Laws, Guthrie's edition, Edinburgh, 1869) remarks:

"Many say that laws as to prescription are laws of procedure, and must, therefore, be applied to all the actions brought within their territory, without respect to the local law of the obligation."

"According to the true doctrine, the local law of the obligation must determine as to the term of prescription, not that of the place of the action; and this rule, which has just been laid down in respect to exceptions in general, is further confirmed in the case of prescription, by the fact that the various grounds on which it rests, stand in connection with the substance of the obligation itself. Besides this opinion has always been acknowledged to be correct by not a few writers."

Savigny finally holds the view that when a place of payment is specified, the law of that place should apply, in pursuance of the rule, *contraxisse unusquisque in eo loco intelligitur, in quo, ut solveret, se obligavit.*

Savigny (in foot note *u*) further observes, that this doctrine is agreed to by Hert, § 65; Schaffner, § 87; Wachter, 2, pp. 408-412; Koch, 1, p. 133, note 23; and Bornemann, 1, p. 66; but that their agreement is only in regard to the principle, not to all the applications of it; since the local law of the obligation is not determined in the same way even by these writers. In fact Hert and Schaffner are of opinion that the *lex loci solutionis* should be entirely overlooked, and that the *lex loci contractus* should rule in all cases.

Massé maintains that the *lex loci solutionis* or *lex loci domicilii debitoris* should rule in all cases:

"Il faut donc arriver," he says, p. 460, "au dernier système qui évite ces inconvénients, tout en se rattachant d'ailleurs au principe par lequel on rapporte la prescription, non à la formation du contrat, mais à son inexécution. Ce système fait prévaloir la loi du lieu de paiement ou de l'exécution, quand un lieu a été indiqué, et celle du domicile du débiteur, quand aucun lieu n'a été indiqué pour le paiement, parce que c'est là que l'obligation est payable." Massé quotes in support of his view Casaregis, *Discurs.* 130, No. 25 *et seq.*, and a decision of the Senate of Chamberry (1593), reported by Favre, and thereupon he attacks Pardessus (*Droit Com.* No. 1495) for holding that, when no place of payment is specified, the law of domicile of the debtor at the time of the contract, and not at the time of the institution of the action, should be applied. "J'ai donc de la peine à m'expliquer pourquoi M. Pardessus qui reconnaît que la prescription doit être réglée par la loi du lieu où le débiteur a promis de payer, veut que dans le cas où ce lieu n'est pas déterminé et où par conséquent, le paiement doit être demandé au domicile du débiteur, la prescription soit réglée par la loi du domicile qu'avait le débiteur au moment où il s'est obligé, bien que, s'il y a eu changement, le paiement ne doit pas être fait à ce domicile."

Marcadé on art. 2219 of the *Code Napoléon*, in turn attacks the opinion supported by Troplong and Massé:

"M. Troplong," he observes, "qui tient pour la loi du pays où le paiement devait se faire, en donne cet incroyable motif, que la prescription extinctive des obligations étant la peine de la négligence du créancier, c'est la peine établie dans le lieu convenu pour le paiement que ce créancier doit subir, puisque *c'est dans ce lieu qu' il a été négligent*.... .......Nous avouerons que loin de trouver une pareille raison fort simple, nous la trouvons au contraire fort bizarre, et aussi fausse que bizarre, fausse deux fois pour une, comme on va le voir bientôt..............

"Ainsi, de quelque côté qu'on se tourne et quelque ordre d'idées qu'on prenne pour point de départ, on se trouve toujours ramené à cette conclusion, conforme à la doctrine des anciens auteurs, que c'est uniquement le domicile du débiteur qu'il faut considérer ici."

Such is the state of opinion on the continent of Europe, upon the question now before us; and it will be conceded that if we had no other resource than these authorities, we should find it difficult, if not impossible, to arrive at a satisfactory conclusion. The review we have just made, clearly shows that no less than eight different systems prevail on the continent:—

1. *The law of domicile of the creditor in all cases*, supported by Pothier and Dumoulin.

2. *The law of domicile of the debtor at the time of the institution of the action in all cases*, supported by John Voët, Pôhl, Thôl, Bar, Berroyer and Laurière on Duplessis, Arrêts of the *Parlement de Flandre* (17th July, 1692, and 30th October, 1705), Bruxelles, (24th September, 1814), Merlin, Marcadé, Félix, Arrêts de Cologne, (7th January, 1836, 4th April, 1839, and 14th December, 1840), Cour de Cassation of Berlin, (8th October, 1838.)

8. *The law of the place of the contract in all cases*, supported by Hert, Mansord, Rocco, Reinhardt, Schaffner, Demangeat; Douai (16th August, 1834); Paris, (7th February, 1839. Alger, 18th August, 1848, and 18th January, 1840.)

4. *The law of the place of the contract, and when a place of payment is specified, the law of that place*, supported by Wachter, Koch, Brunnemann and Savigny.

5. *The law of the domicile of the debtor at the time of the institution of the action, and when a place of payment is specified, the law of that place*, supported by Christin, Burgundus, Mantica, Casaregis, Favre, Boullenois, Troplong and Massé.

6. *The law of the domicile of the debtor at the time of making the contract, and when a place of payment is specified, the law of that place*, supported by Pardessus.

7. *The law of the domicile of the debtor at the time of the making of the contract in all cases*, supported by Dunod.

8. *The law of the place where the action is brought, in all cases*, supported by Paul Voët, Hommel, Huber, Weber, Tittman, Mayer, Glück, Mittermaier, Mühlenbruch, de Linde, and by the English and American decisions, as will be seen hereafter.*

From this synopsis, it may be seen that the *lex loci contractus* or *solutionis*, is held only by four German writers, while the *lex domicilii debitoris* is sustained by most of the old and the new French jurists and commentators.

It is evident that the question of controversy is not a question of local, but of international law, *une question d'école*, upon which the jurisprudence of all nations ought to be properly consulted and weighed. It is necessary that upon matters of this highly practical importance not only to a special community, but to the commercial world at large, there should be uniformity of decision. It is equally beneficial to the people of this country and to foreigners, when they deal with each other, that they should know that the obligations arising out of their transactions are submitted to the same rules of international law. There has been in England, Scotland, and the United States, a uniformity of jurisprudence on this point, and it would be against public policy for our courts to rule differently.

We find in the nature of the English Statute of Limitations, adopted by the United States and the British Colonies, another reason for adopting the *lex fori*. On the European continent, prescription is essentially a presumption of payment, which may be rebutted by contrary evidence; it is more an exception than a defence. On the contrary, in Canada, as in England and the United States, prescription is a mere denial of action, so much so that the oath of the debtor, as to payment, cannot be demanded in a Court of Justice.

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* In Scotland another system, still assented to by Guthrie on Savigny, prevailed in former times, viz., the law of the domicile of the debtor during the whole currency of the term of prescription.

(*To be continued*)

We are glad to see that the Chief Justice has again taken his seat on the Bench in Term, after his holiday. He looks all the better for his rest from labour, and we trust his health is permanently better.

## LAW SOCIETY, EASTER TERM, 1870.

### CALLS TO THE BAR.

Fifteen gentlemen went up for examination for call, of whom the following were successful (Mr. Fitzgerald and Mr. Sharpe without an oral examination):—

W. Fitzgerald, M.A., London; W. Sharpe, Toronto; J. F. French, Merrickville; —Holcroft, Ingersoll; A. F. Campbell, M.A., Simcoe; Chas. H. Bell, M.A., Belleville; D. Junor, M.A., St. Mary's; — Smith, Toronto; A. G. McMillan, Elora; J. G. Hodgins, M.A., Toronto.

### ATTORNEYS ADMITTED.

Of thirty-five gentlemen who presented themselves for examination for certificates of fitness as Attorneys, the following were successful:—

A. F. Campbell, Simcoe; C. H. Bell, Belleville; F. Arnoldi, Toronto; D. Wade, Brockville; H. Macdonell, Guelph (these five without oral); M. A. Dixon, Toronto; Alex. Grant, Stratford; H. H. Smith, Peterboro'; F. C. Clemow, Ottawa; J. H. Ferguson, London; E. W. Harding, St. Mary's; T. G. Ceyne, Toronto; Geo. Hall (who passed the examination, but, as his articles were defective, has not as yet been admitted.)

In addition to the above, four gentlemen, who were unsuccessful on their oral examination, are to have another chance during the Term.

The Session of the Dominion Parliament that has just closed, has not been fruitful of any measure peculiarly interesting to lawyers. The Supreme Court Act, the debate on which was looked forward to with much interest, has to stand over until next session. It is a most important measure, and will doubtless lose nothing by the opportunity thus given for further considering its provisions.

## SELECTIONS.

### THE FRENCH BAR.

(*Continued from page* 92.)

We have not space to recount the chequered fortune of the Bar, its destruction at the Revolution, and its restoration under Napoleon; but we must pass on to that portion of Mr. Young's work, which doubtless may be considered the most interesting, namely the biographical notices of some of the many great men who have graced with their eloquence, or dignified with their learning, the ranks of the profession in France. Among jurists the names of Cujas, Pothier, and Portalis will ever be honoured, and the labours of the French Bar in jurisprudence are eminently worthy of recognition. Pothier was born at Orleans, in 1699. He completed his legal studies in the University of that city, and was appointed Councillor in the Presidial Court of Judicature at the age of twenty-one. In 1736 he commenced his great work on the Pandects, which occupied him during twelve laborious years. In this immense task he had the help of some of his intimate friends, among others of Prevot de la Janés, his colleague in the Court, and Professor of French Law. Upon the death of his colleague Pothier became professor, and his able and enthusiastic teaching speedily gave a remarkable impulse to the school of law at Orleans. For twenty-five years Pothier presided over it, and educated many of the first advocates and magistrates of France. The mantle of Pothier, as a jurist, seems to have descended upon Portalis, who was, perhaps, the ablest lawyer and most upright man who took part in the preparation of the Code Civil. The public life of this distinguished man did not commence until he was more than fifty years of age, and during the whole period of his great labours as a jurist and politician he was almost totally blind, unable either to read or write, his extraordinary memory, however, making up for this defect.

But whatever may be the claims of the French Bar to be considered learned, however much their labours may have added to the science of jurisprudence, it possesses the gift, we were nearly saying the "fatal gift," of eloquence to an extent which removes it far above all competition with our own.

Mr. Forsyth, in his "Hortensius," points out that until the magic of Erskine's voice and eloquence was heard in our Courts, the annals of our great trials do not furnish us with much, perhaps hardly anything at all, worthy of the name of eloquence. If this was the case before the days of Lord Erskine, what have we had since? It is true that Lord Brougham treated our Courts to some powerful and meteoric flights of what was termed in his day eloquence, and thundered forth in both our Houses of Parliament powerful and weighty orations which, in our opinion, did contain, among much, very much, that was extravagant and turgid, here and there passages of great beauty. But his speeches are drugs in the market, and his memory remains with us secured on other, it may be deeper, foundations. Since Lord Brougham we have not possessed half-a-dozen advocates as orators of any real mark. The late Lord Chief Baron, the present Lord Chief Justice, Lord Chelmsford, and perhaps pre-eminently Serjeant Wilkins, found no compeers, and have left no successors as orators, however able as nisi prius advocates the present generation of our leaders at the Bar may be.

The national character is ponderous, and he who can nonsuit by an array of cases, or set aside a verdict "upon the authorities," is as much, if not more to the taste of the English attorney (who, after all, is the *deus ex machinâ*), as the glib, agile Q.C., who makes a jury laugh with him.

The national characteristic to which we have pointed accounts for some of the differences between the two professions. But we cannot help thinking that, beyond this, the French possess a far more worthy appreciation than we do ourselves, of the duties, the reponsibilities, and the dignity of the advocate's calling. The tradition of their political power, the result of splendid service, the independence of their profession, their social status, all these furnish bonds of brotherhood, while the old custom of the interchange of papers (one of the oldest of their ordinances), and the ready joint action of the whole order where their privileges or their rights seemed to be in danger, show the confidence they possess in each other's loyalty and honour.

We have hardly space to mention the names even of the more eminent among them, whose reputation as orators still survives, and whose speeches are remembered. Among others, Pierre Séguier (one of whose descendants, the Baron Séguier, so recently resigned his office of Procureur-Imperial in the Court of Toulouse); Omer Talon, in the 16th, Servin and Antoine Lemaistre, in the 17th, and D'Auguesseau towards the close of the 17th century, are well known. Of these D'Auguesseau is the best known. This eminent advocate was born at Limoges, in the year 1668, and was appointed King's Advocate at the Châtelet of Paris at the early age of twenty-one. How true is the saying, "that the history of greatness is the history of youth." Distinction at the French Bar has been, in the great majority of cases, attained at an age which, in this country, would be barely sufficient to entitle a man even to hope for an assize prosecution for burglary, or an undefended cause in Middlesex. At thirty-two years of age D'Auguesseau was made Procureur-General, and Chancellor of France at forty-eight; a success almost as rapid as that of Grotius, who pleaded at the Bar when only seventeen, and was made Attorney-General of the Netherlands at twenty-four.

The discourses of D'Auguesseau are well known. In his magnificent eulogium upon the Bar occur those words, a portion of which we have already quoted, and which we will repeat. Speaking of the Bar, he says:—

> "It is an order as ancient as the magistracy, as noble as virtue, as necessary as justice; it is distinguished by a character which is peculiar to itself, and it alone ever maintains the happy and peaceful possession of independence."

Passing the great names of Normand and Cochin, cotemporaries of D'Auguesseau, we must for a moment pause at that of Gerbier. This great advocate did not commence to plead in the Courts until he was twenty eight years of age. But his rare merit soon placed him at the head of the Bar. In his time we first begin to catch a glimpse of the lucrative character of the profession in France. It is said that he received a fee of 4000*l.* (about 100,000 francs), from the Company of the Indies, and 20,000*l.* from a Sieur Cadet, for whose cause he had pleaded successfully.

Mr. Young has here a note upon the fortunes made at the English and French Bars, and compares them with those amassed by the advocates of Rome under the empire, very much to the advantage of the latter: but it is by no means clear that the fee system, as we understand it, obtained at Rome at all, and regard being had to the *then* value of money, the amount of these sums appears to be enormous, very many times beyond any legitimate fee we think ever given in England.

At the time of the Revolution, when the Bar was abolished, after the law of August 16, 1789, under which every one was to have the right of pleading his own cause for himself, one and only one in the Constituent Assembly stood up in their defence, and that one, Robespierre.

> "The Bar," said he, "seems still to display liberty exiled from the rest of the world; it is there that we still find the courage of truth, which dares to proclaim the rights of the weak and oppressed against the powerful oppressor. The exclusive power of defending citizens shall be confined by three judges and three lawyers! In that case you will no longer behold in the sanctuary of justice those men capable of rising to enthusiasm in behalf of the cause of the unfortunate, those independent and eloquent men, the support of innocence, and the scourge of crime. They will be repelled, but you will have

welcomed lawyers without delicacy, without enthusiasm for their duties, and only urged on in a noble career by sordid considerations of interest; you mistake—you degrade—functions precious to humanity, essential to the progress of public order; you close that school of civic virtues where talent and merit learned, while pleading the cause of citizens before the judge, to defend thereafter that of the people in the legislative assemblies."

Resuming the path of our history from which we turned aside for the moment, we find between the time of Gerbier and the present, materials that might well afford matter for a lengthy paper—the trial of Louis the Sixteenth and that of his queen, the reorganisation of the Bar under Napoleon, the trial of Marshal Ney, and the revolution of 1830; but the Bar of the nineteenth century must claim our remaining space. Hennequin, Berryer, *père et fils*, the brothers Dupin, Dufaure, Garnier-Pagès, Ledru-Rollin, Baroche, Poulier, Jules Favre, Emile Ollivier, with many others, are names with which we are familiar.

Hennequin was engaged in almost all the great trials which took place between the years 1814 and 1834. Among them were the celebrated cases of the disputed succession which followed the death of the Prince of Conde, who was found hanged in his chateau in the August of 1830, and with whom perished the great house of which he was the last representative. Two years after he undertook the defence of the Duchesse de Berri, who had been arrested while vainly endeavouring to rekindle the smouldering embers of civil war in La Vendee. About this time, Antoine Pierre Berryer began to rise to fame. No name is so well known as his. This distinguished man was for many years the undoubted leader of the French Bar, and to him the Bar of our own country has paid reverential honour. The father of Berryer, an able and distinguished advocate, defended Marshal Ney, and the position of the father naturally paved the way for the son. Berryer's life, as that of nearly all the greatest advocates in France, is as much political as forensic. And this characteristic of the French Bar makes its own history almost the history of France.

Among many great political trials in which M. Berryer was engaged, one stands out far above all others in interest—we mean the trial of the present Emperor of the French, for his attempt at Boulogne. In 1852 M. Berryer was elected Bâtonnier of the Parisian Bar; and, so late as 1858, defended Count Montalembert, who was prosecuted by the Government for certain alleged libellous expressions contained in a newspaper. We most of us remember M. Berryer's visit to Lord Brougham in 1864. Upon that occasion the Bar entertained the two venerable advocates at a banquet in the Middle Temple Hall. His last appearance in the Legislature was in February, 1868; on November 29 following he breathed his last. To the last a Royalist, upon his death-bed, after receiving the last sacrament of the Church, he wrote that touching letter to the Compte de Chambord, which now is matter of history.

Louis Garnier-Pagés and Ledru-Rollin are known to us rather as politicians than barristers, and MM. Thiers and de Tocqueville have achieved a fame, broader and wider than that which the Bar alone can give. Two names of men living among us claim our notice, and with them our imperfect notice of Mr. Young's book must close.

Jules Favre, at present the acknowledged leader of the democratic party in France, and one of the most consummate of living orators, was born at Lyons in 1809. His speech before the Court of Peers in 1835, on behalf of those who were implicated in the fatal disturbances at Lyons, one of great eloquence, marked him out at once. On the retirement of the famous Abbe Lammennais from the management of the journal *Le Mouvement*, M. Favre became one of its chief political directors. In 1860 and 1861 M. Favre was elected Bâtonnier of the Parisian Bar. M. Favre is one of the most consummate speakers of modern times. He has acquired the art in its every branch, and possessing a profound knowledge of his own language, moulds it with a delicacy of finish that is, perhaps, unrivalled.

The present Prime Minister of France, Emille Ollivier, was born at Marseilles in 1826, and was admitted to the Parisian Bar in 1846. In politics a Liberal, his views are far more moderate than those of M. Jules Favre. As a lawyer he is eminent, and as a speaker, although far inferior to the great democrat, is bold and eloquent.

One quotation we shall give. It is taken from his reply to M. Baroche, in defence of liberty:—

> "I affirm," says M. Ollivier, "that the honourable M. Baroche does not believe in the power of liberty, because he sees only its excesses These excesses I also, like him, acknowledge and detest. But, for the same reason that we do not forbid the use of fire, because it burns as well as warms; for the same reason that we reject not religion, because there are wicked priests, and justice, because there are false sentences; for the same reason that we condemn not marriage, because there are adulterers; for the same reason that we refuse not to commence a voyage, because we may encounter tempests on the sea instead of propitious winds and starry skies: for the same reason I do not understand why we should proscribe liberty on account of its excesses! In all worldly things the good and the bad are found side by side. We must have the manly courage, when we follow the good, to accept the difficult conditions of strifes and efforts which are the beauty the glory, the dignity of great undertakings. Royard-Collard has said so, and yet he was no demagogue. Constitutions are not tents set up for sleep; governments are not places of repose, where one's days may glide away in tranquillity, without care or

anxieties; they are posts of honour, because they are posts of battle and of danger!"

Our task is now done. Imperfectly as our work has been executed, we hope, nevertheless, that this mere outline that we have been able to lay before our readers may induce them to read a book, which apart from its own merit, and this is considerable, has an interest we venture to think very far beyond the limits of the profession to which it is more especially addressed.—*Law Times.*

## RIGHT OF A LANDLORD TO REGAIN POSSESSION BY FORCE.

"The law," says Mr. Justice Wilde, in *Sampson* v. *Henry*, 11 Pick. 379, 387, "does not allow any one to break the peace, and forcibly to redress his private wrong. He may make use of force to defend his lawful possession; but, being dispossessed, he has no right to recover possession by force and by a breach of the peace." A similar declaration was made by Lord Lyndhurst at Nisi Prius, in the case of *Hillary* v. *Gay*, 6 C. & P. 284. In neither case was so broad a proposition called for by the facts at issue; yet the doctrine thus advanced has been repeated without qualification by courts and text-writers, and applied in cases, or made the foundation for liabilities to which its application was warranted neither by authority nor on principle.

The subject we propose to consider is, how far a landlord, who regains by force the possession of the demised premises, after the possessory right of the tenant therein has determined, can be held subject therefor to any other liabilities than those which the Statutes of Forcible Entry and Detainer have expressly annexed to his act; and, secondly, what is nature and extent of these express liabilities.

By the Statutes of Forcible Entry and Detainer, whether in England or the United Stotes, but three penalties are anywhere expressly imposed; first, fine or imprisonment; secondly, restitution upon a conviction, or, when the force is found upon inquisition or otherwise by a justice or a jury, in some localities purely a criminal, and in others also a civil, consequence of the act; and, thirdly, a special action on the statute with treble damages, which is given by the English statute, and by those of a few of the United States.[*] But, by implication from the statutes, the employment of force by the landlord in regaining possession has also been held to render him liable in trespass for assault, or for removal of the tenant's goods, and in a few instances also to an action of trespass *qu. cl.* We propose to proceed in our inquiry in the inverse order to this enumeration, and to inquire, first, how far an action of trespass at common law is warranted by the authorities, and then what is the extent and application of the statutory penalties proper.

That a tenant whose right to possession is determined either by the expiry of his term, by forfeiture, or by notice to quit, and who is therefore a tenant at sufferance, and himself a wrong-doer, may yet treat his lessor, who is entitled to immediate possession, as a trespasser, and relying on his right, maintain trespass *qu. cl.* against him, merely because the right of the latter has been forcibly asserted, seems so extraordinary a proposition, that if not warranted by express words of the statutes, nothing but the clearest implication from their language could justify it, and as the removal of the tenant upon or after entry is but a part of the act of entry, and depends on the legality of the possession thereby gained, for its justification, the action for assault or for the removal of the tenant's goods, must stand or fall with the action of trespass *qu. cl.*

It is admitted, it should be remarked, in the first place, that, at common law, the lessor was liable to no action for forcible entry or expulsion of the tenant; but at most to an indictment for a breach of the peace, punishable only by fine or imprisonment.[†] But the ground taken is, that the express prohibition of such entry, with a penalty therefore, by the Statutes of Forcible Entry and Detainer, made the act civilly illegal and incapable of revesting the lessor with a lawful possession, and that for such entry or any assertion of possession based thereon, the lessor became liable like any mere stranger to the lessee.

The English statutes on this subject, from which, with some variations, all those in the United States have been derived, were, excepting only some supplementary enactments not material here, three in number; 5 Rich. II. c. 8; 8 Hen. VI. c. 9, and 21 Jac. I. c. 15. By the first, it was declared "That none from henceforth shall make any entry into lands or tenements but in case where entry is given by law; and, in such case, not with the strong hand, nor with multitude of people, but only in a peaceable and easy manner;" and fine and imprisonment were imposed upon conviction for such forcible entry. By the Stat. 8 Hen. VI. c. 9, forcible detainer, as well as forcible entry, was made criminal, an action of trespass or assize of novel disseisin on the statute with treble damages was given to the party disseised, and restitution on the finding of the force was also to be made to the party *disseised*, and as this term was held to imply a freehold, the right to have restitution was by the Stat. 21 Jac. I. c. 15, extended to tenants for years also.

It will be perceived, that while these statutes make a violent entry or detainer an offence, they also expressly specify the penalties incurred, and thereby exclude the idea of any implied liability, except the indictment at common law, and it has accordingly been held with increasing definiteness by the English courts that these statutes are special, subjecting the offender only to the penalties named therein, and do not affect the civil character of the act. But two decisions—one of them an extra-judicial Nisi Prius ruling, and the other a majority opinion—break the nearly uniform current of authority, and treat the lessor as a trespasser, and liable as such to his tenant at sufferance. Neither of them however—although they are the sole reliance of the American courts that have held the lessor to such a liability—sustain an action of trespass *qu. cl.*, but only of trespass for assault, and both were shaken and finally overruled by repeated decisions in the Courts of Exchequer, King's Bench, and Common Pleas.

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[*] Of Vermont, Connecticut, New York, and Wisconsin.

[†] Hawkins, Pl. Cr. B. 1, ch. 28, sec. 3; *Dustin* v. *Cowdrey*, 23 Vt. 631, 635.

For the doctrine seems early to have been established that the removal of the tenant by force, unless excessive, was not of itself the subject of a personal action, but depended on the title to the possession, and hence that *liberum tenementum* was a good plea to such a removal as well as to trespass *qu. cl.* Thus in *Taylor* v. *Cole*, 3 T. R. 292, in an action of trespass *qu. cl.* with a count for expulsion, a plea of justification of the entry under process was held a defence to both counts. The occupant yielded without forcible resistance to the expulsion, but it was held generally that expulsion was mere matter of aggravation to the trespass to the land, and was answered with this by a plea of title unless there was undue force and the plaintiff new assigned for an assault. The principle established by this case was, therefore, that a party regaining possession by title might assert that possession and expel the occupant with any proper amount of force. The sufficiency of title, as a justification, was again declared in *Argent* v. *Durrant*, 8 T. R. 403, where a lessor was held not liable for entering and pulling down a wall, while the tenant held over, and was carried still further in *Butcher* v. *Butcher*, 7 B. & C. 399, where a freeholder after entry was allowed to treat the party who persisted in remaining as a mere wrong-doer, and to maintain trespass *qu. cl.*, against him.

While these last two cases sustain the right to expel after a peaceable entry, they do not determine how much force in entering could be justified under color of title, or whether a violent entry, because criminal, was civilly illegal. But in *Taylor* v. *Cole*, *supra*, the principle that a legal possession can be acquired by an entry though made with such force as to be criminal under the Statutes of Forcible Entry and Detainer is very distinctly intimated by Lord Kenyon, who says, "It is true that persons having a right are not to assert that right by force; if any violence is used it becomes the subject of a criminal prosecution." And in *Taunton* v. *Costar*, 7 T. R. 431, the same eminent judge distinguished between the the penal consequences of a forcible entry and its civil effect still more clearly, saying, "Here is a tenant from year to year whose term expired. . . . . He now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear the landlord could have justified under a plea of *liberum tenementum*. If, indeed, the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry, but there can be no doubt of his right to enter upon the land," &c. In *Turner* v. *Meymott*, 1 Bing. 158, the point was directly decided. There the landlord, on the determination of a tenancy at will, broke into the house with a crowbar, tenant being absent, but having left furniture in the house, and resumed possession. It had been settled long before that such an entry into a dwelling-house was *per se* indictable.‡ The tenant brought trespass, *qu. cl.* on the ground that the entry, being a criminal act, was not a legal repossession, but a trespass, and obtained a verdict. It was strenuously urged in its support, that a right to regain possession by force would render the action of ejectment superfluous, and that it was absurd to hold an act legal for which an indictment lay. But the court at once set the verdict aside, saying, "It must be admitted that [the landlord] had a right to take possession in some way. . . . If he has used force that is an offence in itself, *but an offence against the public*, for which if he has done wrong he may be indicted.

It seemed well settled, therefore, that a legal possession might be regained by force with no other risk than that of an indictment; and no distinction was taken between force to the premises and to the person of the tenant, nor could any be made, as each is alike indictable under the statute; § and further, that when the lessor had repossessed himself, he could expel the occupant with necessary force. So stood the law when the case of *Hillary* v. *Gay* arose at Nisi Prius. The action was trespass *qu. cl.*. with counts for expulsion, &c., and the facts were that after the plaintiff's tenancy at will had expired, the landlord distrained, and then entered peaceably, and, when in, removed plaintiff's wife and goods without unnecessary force. The defendant pleaded the general issue, and relied on his title, citing *Turner* v. *Meymott*, to show his right to assert that title by force; but Lord Lyndhurst, who presided, distinguished that case on the ground that there the tenant was not in possession, adverted also to the fact that here the tenancy had not determined, as the landlord by distraining had reaffirmed it, and, in a brief opinion, said, "The conduct of the landlord cannot be justified. If he had a right to the possession, he should have obtained that possession by legal means." This is the whole case. The landlord had no right after distraining to enter at all, as by that act the tenancy was restored: (Taylor, Land, & T. sec. 485), and he was liable for his entry without regard to force. What was said about force, was therefore extra-judicial; and whatever its weight, must, as there was no forcible entry at all, be referred to the count for expulsion. The decision amounts therefore, so far as our inquiry is concerned, only to a *dictum*, that, after a peaceable entry, the landlord is liable in trespass for assault, if he uses actual though moderate force to remove the tenant. But this would overrule *Butcher* v. *Butcher*, *supra*, which, it may be remarked, was not adverted to in this case, where a legal possession, once regained, left the occupant who persisted in remaining, liable to be treated as a mere trespasser.

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‡ *Rex* v. *Bathurst*, 3 Burr. 1710, per Mansfield, C. J., Wilmot and Yates, JJ.

§ *Rex* v. *Bathurst*, *supra*; *Willard* v. *Warren*, 17 Wend. 257, 262.

When, therefore, the question next arose, the ground was taken, that the entry was not complete until possession was wholly regained, and hence, that, if the landlord after a peaceable entry used force to expel, his original entry became by relation forcible, and he was liable in trespass for assault, although not in trespass *qu. cl.* This anomalous doctrine was set forth in *Newton* v. *Harland*, 1 M. & G. 644, the second and only other English case which restricted the landlord's right to regain possession by force. The action was trespass for assault merely, and not trespass *qu. cl.* The lessor had entered quietly on the determination of the tenant's right of possession, and expelled him with moderate force. He pleaded lawful possession, *molliter manus*, on which issue on the above facts, Parke, B., directed a verdict for the defendant. A new trial was granted in the Common Pleas, Tindal, C. J., thinking that the facts had not been fully brought out, and expressing a doubt if the lessor could assert his right with force. On the second trial, Alderson, B., ruled that a lessor could expel a tenant holding over, if he "used no unnecessary violence," and a second verdict was found for the defendant. On the case again coming before the Court of Common Pleas, Tindal, C. J., held that there were two questions involved; first upon the right of the lessor to expel, after acquiring by entry peaceful possession; upon which he gave no opinion, and which in fact had already been decided by *Taylor* v. *Cole* and *Butcher* v. *Butcher*, *supra;* and second on the character of the possession acquired by the lessor by an entry with force to the person of the tenant, which he considered this to be. Such a possession he held to be unlawful, because gained by a criminal act. Erskine and Bosanquet, JJ., concurred. It was admitted, however, that the landlord could, after a peaceable entry, if the tenant remained in possession, maintain trespass against the latter; and also that, even for a forcible entry, the tenant could not have trespass *qu. cl.* against the landlord, for want of title; p. 667. How this liability of the tenant to be treated as a trespasser after the landlord's entry could be reconciled with the immunity claimed for him from expulsion with force, such as might be applied to any trespasser, was not explained. Coltman, J., dissented, holding that the right of the lessor to re-enter, even if force was used, was well established by the cases cited *supra*, and that having by his entry revested himself with a legal possession, his tenant at sufferance became a trespasser, and was liable to expulsion like any "mere wrong-doer."

This case, it will be seen, gives no countenance to an action of trespass *qu. cl.* This was expressly declared by Erskine, J. *ubi supra.* In so far as Lord Lyndhurst's *dictum* in *Hillary* v. *Gay* has been regarded as supporting such an action, it is here directly repudiated. But the doctrine maintained is, that force to the person of the tenant in possession is not justified by entry under title, because by relation such an entry is affected by the violence which followed it, and is illegal and void. And yet after such entry the tenant has not rightful possession enough to sue his lessor in trespass *qu. cl.*, for his entry, although he could have maintained that action against a stranger. The lessor's entry is, therefore, at once unlawful and yet not actionable, an injury to the tenant for which he nevertheless cannot sue. How it can be at the same time unlawful and justifiable is not attempted to be explained.

Nor does this anomalous doctrine derive mere weight of authority from this case. The opinions of the three judges who decided it are quite balanced by the judgments of the dissenting judge, and of Barons Parke and Alderson. For the rulings of these latter judges at Nisi Prius in this case were not hasty enunciations, abandoned when controverted by a higher court, by were reasserted by them, with distinct emphasis, in the next case which arose —*Harvey* v. *Brydges*, 14 M. & W. 437—Parke, B., laying down the law in the broadest manner in these words: "Where a breach of the peace has been committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt, that it is a perfectly good justification, that the plaintiff was in possession of the land against the will of the defendant, who was owner, and entered upon it accordingly, even though in so doing a breach of the peace was committed." Alderson, B., added, "may a freeholder lawfully enter on his own premises with any degree of force? I have still the misfortune to retain the same opinion that I expressed in *Newton* v. *Harland*." A plea of *liberum tenementum* was accordingly held a good answer both to trespass *qu. cl.*, and for expulsion also. The amount of force did not appear; but even if there were no actual force, and these statements of law went beyond the facts of the case before the court, they must now be considered conclusive, as the language of Parke, B., has been adopted in terms as a controlling authority in a late and parallel case where actual force was used, arising in the same court that decided *Newton* v. *Harland*: *Blades* v. *Higgs*, 10 C. B. N. S. 713, 721.

The language of Parke, B, is, it will be seen not limited to a denial of the anomalous doctrine of forcible entry by relation, propounded by the court in *Newton* v. *Harland*, but broadly lays down the right of entry by force, and its competency to confer a legal possession and consequent right to expel by force; and the decisive adoption of this broad proposition by the court in *Blades* v. *Higgs* is conclusive as to the position of the English law on this point at the present day. But without disposing of the questions involved in this inquiry merely by referring to this latest decision, we find that the cases prior to this and since *Harvey* v. *Brydges* have reaffirmed with equal distinctness the positions taken by the earlier cases first stated, and as distinctly have denied the authority of *Newton* v. *Harland*.

The doctrine asserted in this latter case and in *Hillary* v. *Gay*, that the presence of the tenant restricted the lessor from using force was effectually disposed of by *Davison* v. *Wilson*, 11 Q. B. 890, where title was held on demurrer a sufficient plea to trespass *qu. cl.*, for entering, &c., "with a strong hand" on the tenant's possession in such a manner as to constitute an indictable offence; and even more decisively by *Burling* v. *Read*, *ib.* 904, where the same plea was held good to trespass, *qu. cl.* for a forcible entry made on the possession of the tenant, and for destruction of the premises, and a plea of *molliter manus* to a count for assault for the forcible removal of the tenant. In *Davis* v. *Burrell*, 10 C. B. 821, the court in terms denied the authority of *Newton* v. *Harland*, and in fact overruled it, holding title a good plea to trespass for assault against the lessor who had re entered during the tenant's temporary absence, and forcibly held him out; since no distinction can be drawn between forcibly putting and forcibly keeping out of possession, and the facts were on all fours in the two cases. On the other hand, the sufficiency of the plea of title not only to trespass *qu. cl.* but to a count for expulsion also, unless this last was a distinct or excessive assault, was reaffirmed in *Meriton* v. *Coombes*, 1 Lowndes, M. & P. 510; where on the new assignment by the plaintiff of the expulsion, a demurrer was sustained, as there was no assault; since the expulsion was only an injury to the possession, and covered by the plea of title; in other words that the title or right to immediate possession gave also the right to expel with necessary force; and in *Pollen* v. *Brewer*, 7 C. B. N. S. 371, where, on trespass against the lessor, with separate counts for assault and *qu. cl.* with expulsion, he court held the latter not maintainable upon a plea of title, as the tenant was "clearly a trespasser," and that "the landlord had a right to enter and turn the tenant out," and the latter could only recover for the excessive force under the count for assault.

In all this long line of cases not one sustains the action of trespass *qu. cl.*, and it is distinctly admitted not to lie by the only decision adverse to the lessor's right to use force; and it is as distinctly the result of authority that no action lies for force to the person, unless this is excessive, and the distinction, if any, between force to the person and to the premises —the so-called doctrine of vacant possession —meets not the slightest countenance.

(*To be continued.*)

## CLERICAL DISABILITIES.

"Once a priest always a priest," is a law which the public mind was very prone to approve, and possibly a considerable minority will even now be shocked at the introduction of a bill to enable priests and deacons to relinquish their offices and to become laymen. Nothing, however, can be more fair or more expedient than such a measure. To keep a man for lifetime in a profession for which he is unsuited, or which compels him to do violence to his conscience, is cruel oppression. On the other hand, it is for the interest of the Church that she should be rid of unwilling ministers. The bill introduced by Mr. Hibbert enacts that a priest or deacon may, after having resigned every preferment held by him, execute a deed relinquishing the office of minister, and after six months the deed shall be recorded. and the one-time minister will become for all purposes a layman. If the ex-minister wants to return to the clerical profession he can revoke the deed of relinquishment, and the archbishop may, if he thinks fit, immediately or after a lapse of time cause the new deed to be recorded, but the re-admitted minister will not be capable of holding any perfermeut for two years after the recording of the deed of revocation. We deem this a very just clause. It is right that the archbishop should have a discretion in respect to re-admitting a person who has once relinquished the office of minister, and the disability to hold any preferment for two years will provent any playing fast and loose with the ministerial office for the sake of emolument. The 9th clause says, 'Nothing in this Act shall relieve any person or his estate from any liability in respect of dilapidations, or from any debt or other pecuniary liability incurred or accrued before or after the execution of a deed of relinquishment under this Act.' This is an unexceptional provision. Any minister availing himself of this Act will do so either on account of conscientious scruples in respect to his continuing a minister of the Church of England, or else because he thinks he can do better for himself and his family in some other calling. Mr. Hibbert's bill is a well-considered measure, and we hope it will be accepted by Parliament.—*Law Journal.*

## ONTARIO REPORTS.

### PRACTICE REPORTS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### In re Potter and Knapp.

*Arbitration — Notice of meetings — Proceeding ex parte — Duty of Arbitrator and dominus litis.—Costs.*

*Held*, 1.—That before an arbitrator undertakes to proceed *ex parte*, he should satisfy himself by proper evidence that necessary notice of the appointment has been served, so as to enable the party notified to appear, and in case of non-appearance, it should clearly be shewn that such absence is wilful.

2. That the party acting in the prosecution of the arbitration ought to take care that all proper notices are served on the opposite party and should be able to shew, if he desires to proceed *ex parte*, that the other party has been properly notified, and that he wilfully absents himself; nor should the arbitrator proceed *ex parte* unless the notice conveys the information, that the arbitrator will proceed *ex parte* if the party served does not attend, nor should he so proceed, if a reasonable excuse for his inability to attend is given.

A party, therefore, who had not fulfilled his duty in this respect was ordered to pay costs, and the case was referred back.

[Practice Court, Hil. Term, 1870, *Gwynne, J.*]

*O'Brien* for Knapp, hereafter called the defendant, obtained a rule *nisi*, calling upon Potter, hereafter called the plaintiff to shew cause why the award made in this cause should not be set aside, and vacated upon the following, among other grounds, viz:—On the ground of misconduct of the arbitrator: 1st. In having proceeded with the said reference and heard evidence on behalf of the plaintiff in the absence of the defendant, and without notice to him, and without giving notice to the defendant of the time, if any, fixed for proceeding with the said reference, and without giving said defendant an opportunity of examining the remainder of his witnesses, or being heard on the examination of the witnesses of the plaintiff before said arbitrator, subsequent thereto; and, because the said arbitrator exceeded his authority under the submission in having assessed the costs of and incidental to the award, and ordered payment of the same.

The rule was founded mainly upon an affidavit of the defendant, and one Henderson.

*J. B. Read* shewed cause, and filed four affidavits, namely, of Mr. Geo. Whates, McCrea, the plaintiff himself, and one Chase. He contended that the award should stand, the fault, if any, having been that of the defendant.

*O'Brien* contra cited *McNulty* v. *Jobson*, 2 Prac Rep. 119; *Waters* v. *Daly*, Ib 202; *Williams* v. *Roblin*, Ib. 284; *In re Manley et al.*, Ib. 354; Russell on Awards, 179, 191, 199, 207, 655; *Gladwin* v. *Chilcote*, 9 Dowl. 550. The main facts of the case appear in the judgment of

Gwynne, J.—It appears from the affidavits that neither plaintiff nor defendant had any person attending the arbitration for them as counsel or attorney, but that they acted each as his own counsel.

Now from these affidavits I am to say whether I am satisfied that the defendant wilfully abstained from attending the arbitration, although he had ample notice of its several sittings, and, whether the circumstances established by his affidavits shew that the arbitrator was justified in proceeding *ex parte*, or whether the arbitration was conducted in any part in the absence of the defendant, without his having had that reasonable notice of the proceedings which he was entitled to, and without which the arbitration would be divested of its judicial character, and the solemn duty of administering justice between parties be degraded into a farce.

I take it to be sufficiently established that the arbitration opened on the 28th May, which day the arbitrator says he formally appointed, by an appointment endorsed on the bond of submission. By reference to this bond, which was filed on the motion to make it a rule of court, I find that this is so, the appointment being dated the 22nd May for Friday the 28th May, and signed by the arbitrator. Upon the 28th May, it appears that the plaintiff's witnesses were examined, but whether his case was closed upon that day, or upon the 4th June, does not appear; however, there is no complaint made of any of the proceedings of the 28th May. Referring again to the submission, I find an endorsement thereon, also signed by the arbitrator in these words: "adjourned till Friday, June 4th, by consent of parties, J. Higgins, Arbitrator." So far the proceedings appear regular, and to have been as represented by the defendant.

Upon the 4th June, then, I take it that the plaintiff's case was closed, if it was not closed on the 28th, and then the defendant's case was opened by the examination of Henderson. Now the substance of defendant's affidavit and Henderson's is, that the arbitration upon that day broke off without Henderson's evidence having been closed, and while the defendant had another witness named Buck, present to be examined: that there was no adjournment to any other day: and, that defendant left, informing both the plaintiff and McCrae that he would expect a notice of the next meeting, whenever it should be appointed. All the affidavits in reply state, on the contrary, that not only was Henderson's examination completed, but also his cross-examination; and the clerk swears that it was taken down in writing, and when so completed was signed by Henderson. Now upon this point, which certainly was a very material point, it would have been very easy, if this were true, for the examination so taken and signed to have been produced; it would no doubt have settled *one* point upon which there is a very grave contradiction in the affidavits filed by the respective parties.

Then again, the affidavits in reply, concur in saying that there was an adjournment made on the 4th June, after the close of Henderson's testimony, to a future day. The arbitrator, McCrea, and Chase, stating that day to be the 11th June, and the plaintiff stating it to have been until the 18th of June. This *may* be a clerical mistake, and yet in view of what I am about to advert to it *may not*. The arbitrator swears that he made a *formal* adjournment to the 11th; McCrea says that the adjournment was made unto the 11th June, and that he acted as clerk and noted all the adjournments. Now referring to the the submission upon which the first appointment and adjournment are endorsed, I find no adjournment upon the 4th June endorsed at all, but under the adjournment *to* the 4th June. I do find an entry of an adjournment, *which is erased*, and which is in the words following: "adjourned June 11th *to* Friday next, J. Higgins," and the Friday following the 11th June was the 18th June, which is the day mentioned by the plaintiff as the date of the adjournment from the 4th June, so that there may be some colour for something having taken place at some time relating to the 18th June, the day named by the plaintiff; but why is this erased, and why, if the arbitrator did make the *formal* adjournment which he says he he did on the 4th to the 11th, does not that appear on the submission where the other entries of appointment and adjournment, of which there is no dispute, do appear.

Again, if, as McCrea says, he noted down the several adjournments, the production of the minute kept by him would have been very material upon a point as to which also there is such grave contradiction in the affidavits. Then again, the arbitrator swears that what the defendant said upon the alleged adjournment to the 11th being made upon the 4th June was, "that he did not think he would attend, that I might go on whether he was present or not, that he had no further evidence to put in." McCrea states it in somewhat similar terms, namely, "that *he did not think* he would attend as he had no more evidence to offer, and it was of no use coming, and that the arbitrator might proceed in his absence." The plaintiff swears that the defendant stated "that *he would not* attend again, that there was no use as he had no more evidence to put in, and the arbitrator might go on with the hearing." Chase states it as the plaintiff does, that defendant said "that *he would not* attend as he had no further evidence to offer, and that he did *not think* it any use" Now, was Buck there or not in attendance to be examined as a witness by defendant. He swears he was, and no allusion is made to this fact in any of the affidavits filed by the plaintiff, but, assuming that the defendant said what is sworn to by the arbitrator and McCrea, *that he did not think* he would attend; or even what is sworn by the plaintiff and Chase, "that he would not *attend, that he did not think it of any use*" I do not think than an arbitrator in the conduct of a judicial proceeding is justified from such language to proceed *ex parte*, behind the back of one of the parties, without seeing that he had had notice of the further proceedings, so as to give him an opportunity of changing his mind, and of calling more witnesses if he should think fit, or, of being present at least when other witnesses, if any, should be called by his opponent, and of pressing his views equally with his opponent before the arbitrator, if that should have been the purpose for which the meeting was to be held.

Then, the next point is, had the defendant any, and if any, what notice of the intended proceeding upon the 11th, and had the arbitrator any, and if any, what evidense of his having had such notice before he proceeded to take further evidence upon the part of the plaintiff.

The arbitrator swears that he directed McCrea to notify both parties of the intended meeting, that he *knows* that McCrea did so by sending notice to plaintiff and defendant; he says he *knows* that McCrea did so, but he gives me no means of testing the correctness of his knowledge. If he *knows* that McCrea sent the requisite notice he must know what information the notice contained, and how it was sent; but he says nothing in his affidavit upon either of these points. Then McCrea swears that he sent notices as directed by the arbitrator, but he does not say *how* he sent them; and this is in answer to an affidavit of the defendant, that he lives only two miles off, and that he never received any such, or any notice. McCrea without saying how he sent the notice, contents himself with saying that he sent one to defendant, and that he believes he received it, but he gives me no means of judging of the foundation for his belief, or, whether it should out-weigh the affidavit of the defendant, who swears that he never received it. The arbitrator, indeed, swears that the defendant acknowledged to him that he had received the notice.

Now the defendant in his affidavit swears that after he had heard of the award being made, he remonstrated with the arbitrator for having proceeded in his absence, and without having given him notice of his intended sitting of the 11th June; and that the arbitrator replied, that he regretted he had not had notice, but that he could not open the matter, and that he had taken advice upon the subject. Now did this occur or did it not ? it is sworn that it did, and the arbitrator does not deny it. If the allegation of the arbitrator is intended as a denial of the statement in the defendant's affidavit, it is a bald way of denying a very precise and material averment; and if being uncontradicted I am to take the defendants statement in this particular to be true, how am I to understand the arbitrator's reply to the effect that he had acted under advice, upon a point relating to his having proceeded *ex parte* without giving sufficient notice; if he had, *then* the defendant's acknowledgment that he had *received* the notice, or if the arbitrator, as he swears, *knew* that it had been sent *in time*; assuming it even to be true that the defendant did, as the arbitrator swears, *at some time* acknowledge that he had received a notice for the meeting of the 11th, the statement of the arbitrator upon that point is loose enough to be consistent with the fact that the acknowledgment was made after the conversation alluded to by defendant, and that the notice had been so carelessly sent, or sent so late that he did not receive it until long after the award was made, and when it was too late to be of any use But, looking at the preciseness of the affidavit of the defendant upon this point, and the vagueness of the affidavits in reply, I am compelled to adopt the affidavit of the defendant that he never received one; and I am left in doubt whether any was ever sent, or if sent, whether it was sent in such a manner as to present a reasonable expectation that the defendant would receive it in time.

But further, an arbitrator who acts in the character of a judge, before he undertakes to proceed *ex parte*, should satisfy himself by some proper evidence, that the necessary notice not only had been sent, but delivered so as to enable the party notified to appear, and there is no suggestion that the arbitrator required or called for any such evidence before he entered upon the *ex parte* examination of the plaintiff's witnesses on the 11th June.

Granting that the defendant may have had no further evidence to call, though he swears to the contrary, what right had the arbitrator to suppose that he knew that after his evidence was closed further evidence would be received from the plaintiff, without the defendant having notice of that proceeding. The plaintiff indeed swears that the defendant knew that the plaintiff would require to call witnesses to rebut Henderson's evidence. How must the defendant have *known* that? the plaintiff does not pretend that he communicated to the defendant his intention of calling such evidence, and even though the defendant might be content to be absent at any future meeting, as all his evidence had been given, that reason for his absence will scarcely account for its being supposed that he should not attend if the plaintiff should be permitted to adduce fresh evidence, when we find him attending regularly while all the previous testimony was being taken.

In arbitrations, it is, in my opinion, the duty of the *party* acting in the prosecution of the arbitration, whether he be plaintiff or defendant, to take care that all proper and sufficient notices are *served* upon the opposite party, and it is the duty of the arbitrator, before he proceeds *ex parte*, to satisfy himself by sufficient evidence that such notices have been given. Before an arbitrator is justified in proceeding *ex parte*, he ought, in my opinion, to have before him the clearest evidence that the party not attending is wilfully absenting himself; and, when a question arises before the court as to whether an arbitrator has or has not been justified in proceeding *ex parte*, it is incumbent upon the party who did proceed before the arbitrator, to adduce evidence abundantly sufficient to satisfy the court that the party absenting himself had full notice of the meeting or meetings from which he was absent, so as to enable the court to see clearly whether the absence was wilful or excusable, and whether the arbitrator was or was not justified in proceeding in his absence. A very strong case indeed should be made to justify an arbitrator in so proceeding, and it might be well perhaps that it should be established as a rule, that no notice would justify such a proceeding unless it should convey the information that the arbitrator will peremptorily proceed *ex parte* in case the party served with the notice should not attend, and the party serving it should, and even in such a case, the arbitrator should not proceed *ex parte* if the party served should, before the day of meeting, communicate to the arbitrator a reasonable excuse for his inability to attend.

In this case, I must say that I am not satisfied that the absence of the defendant was wilful. There is reason, I think, to doubt that it was even negligent. I am not satisfied that the matters contained in the affidavits filed upon the motion have been displaced by the affidavits in reply, so as to place the defendant in the position of having committed a wilful default; and I do not think that a sufficient case is shewn to have justified the arbitrator in proceeding in the manner in which he did, *ex parte*. Whatever may be the merits of the case, I cannot say that those due precautions have been observed which alone could justify judicial proceedings being taken or continued against a party in his absence.

I have come to this conclusion upon a careful perusal of the several affidavits, and a consideration of the abstract principles of justice, with which all who are conversant with the conduct of proceedings in courts of justice are familiar, without seeking for decisions in like cases, although I doubt not that if it were necessary, abundant authority can be found to support the conclusion at which I have arrived.

As I do not think that the arbitrator's conduct was wilfully improper, but that it proceeded rather from ignorance of the judicial duties of an arbitrator, the rule will be to refer the matter back to the arbitrator, with such enlargements as may be necessary.

I think the plaintiff must pay the costs of this application. It was his duty to see that the enlargements were properly made and notice served, before he called upon the arbitrator to proceed *ex parte*.

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## Stacey v. McIntyre.

*New trial to plaintiff on payment of costs—When to be paid.*

When a plaintiff obtains a new trial on payment of costs, he is not bound to pay them before the next assizes, because, even had the costs been paid, the plaintiff could not be compelled to go to trial at such assizes; but he must be *tout temps prist* to pay the costs taxed to defendant.

On 19th June the judgment for new trial was given, and on 19th August the rule was served, and on 30th September the costs were tendered. *Held*, that the tender was made within a reasonable time.

A rule to rescind a rule for new trial was therefore discharged, but, as the costs taxed, which had (too late for the assizes) been tendered and refused, were not paid into court, without costs.

[Practice Court, H. T., 1870, *Gwynne*, J.]

*O'Brien*, for defendant, obtained a rule *nisi* to rescind a rule granted in Easter Term, 1869, giving plaintiff a new trial on payment of costs, on the ground that the costs taxed under said rule were not paid in accordance with the terms of said rule and the practice of the court in such cases.

It appeared that the venue in this cause was laid in the county of Elgin, and that the case was tried at the assizes in and for the said county, on the 8th April, 1869, and that a verdict was then rendered for the defendant on the first count, and for the plaintiff on the second count of the declaration, with fifty dollars damages, and leave was reserved to the plaintiff to move in Term to enter judgment for himself on the first count.

In Easter Term last the plaintiff obtained a rule *nisi* upon the leave reserved, which rule was argued by counsel for both sides during the same Term, and judgment thereon was reserved; and on or about the 19th June last judgment on the rule *nisi* was given to the effect that the plaintiff should have a new trial upon payment of costs.

On 19th August last a copy of the plaintiff's rule for said new trial, upon payment of costs, was served upon the Toronto agent of the said defendant's attorney, and the said copy was forwarded by the agent to the attorney.

On the 24th September last a letter was received from the attorney for the plaintiff, asking for the bill of the costs so required to be paid by the plaintiff; which was on the same day forwarded by post to the Toronto agent of the defendant's attorney for taxation, and upon the same day a letter was written and posted to the plaintiff's attorney, informing defendant that the bill had been so forwarded to be taxed according to the usual course of practice, and on the next day the agent of the defendant's attorney told the agent of the plaintiff's attorney that the bill was ready for taxation.

The costs were not taxed until the 28th of September last, and on the 30th September were tendered to the defendant's attorney but refused.

The commission day for the fall assizes for the county of Elgin was the 5th October, the last day for notice of trial for the said assizes being therefore the 27th September.

*Boyd* shewed cause:

There is a material difference between an application of this kind by defendant and by plaintiff The plaintiff was not bound to go down to trial at the next assize: the defendant could not have forced him to do so, and consequently the plaintiff was not required to pay the costs previous to the time for giving notice of trial for the first assizes. The plaintiff is not in default, and this rule should be discharged with costs There is no case directly in point, but *Summerville* v *Joy*, 5 Prac. Rep. 144, is an authority in plaintiff's favor, and see C L. P. Act. sec. 227.

*O'Brien*, *contra*. It was the plaintiff that obtained the new trial, and it was his duty to have had the costs taxed promptly and paid forthwith If this rule is granted it must be with costs; if not the plaintiff cannot have costs: *Lush's* Prac. 494; *Rubidon* v. *Harkin*, 2 Prac. R. 129; *Van Every* v. *Drake*, 3 *Ib.* 84; *Johnson* v. *Sparrow*, 1 U. C. Q B. 397; *Stock* v. *Shewan*, 18 U. C C. P. 185.

Gwynne, J—Upon the principle on which I proceeded in *Summerville* v. *Joy*, I must hold that the defendant is not entitled to rescind the rule for a new trial, because the plaintiff did not proceed to trial at the last assizes in the county of Elgin. The rule granted to the plaintiff, upon his own application, a new trial upon payment of costs. Had these costs been taxed and paid before the last day for giving notice of trial for the last assizes, there was no process by which the defendant could have compelled the plaintiff to give notice of trial for, and to proceed to trial at these assizes; his default in doing so would have given defendant no right to rescind the rule, the costs of which had been paid. He must have proceeded according to the practice of the court to bring the case down to trial by proviso, or by notice under the 227th section of the C L. P. Act, whichever is or shall be determined to be the correct practice.

Now, here the plaintiff tendered the costs two days after the last day for serving notice of trial. The defendant refused to accept the costs thinking he could rescind the rule for the default of the plaintiff in not having given notice of trial, but I think the defendant should have received the costs as tendered I think they were tendered within a sufficiently reasonable time to comply with the rule, and as the defendant could not have moved to rescind the rule, if the costs had been paid, so he can not succeed in rescinding it since he himself prevented the payment by his refusal to accept. But the plaintiff should have been *tout temps prist* since to pay the costs, and if he had, upon this rule being served upon him, brought the taxed costs into court I should have felt bound to give him the costs of opposing this application; not having done so, I think the proper rule to make, if it should be necessary to issue any rule, will be to make the defendants rule absolute without costs, unless the plaintiff shall within three weeks pay the taxed costs of the former rule, and in such case the defendants rule will be discharged without costs.

## ELECTION CASE.

### Reg. ex. rel. McGouverin v. Lawlor.

*Quo warranto summons—Forfeiture of seat.*

A summons in the nature of a *quo warranto*, under the Municipal Act, is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, the election having been legal.

[Chambers, March 8, 1870, *Mr. Dalton*.]

This was a summons in the nature of a *quo warranto* under the Municipal Act, complaining of the election of the defendant, as Reeve of the Municipality of the Township of Alfred, in the County of Prescott.

The facts appeared to be, that the defendant filled the office of Reeve for the year 1869: that at the election which took place on the 3rd January last, the defendant was again elected, and accepted office, and afterwards, on the 24th January last, was convicted before two justices "for that he the said George Lawlor, did on the 21st day of December, 1869, at the Township of Alfred aforesaid, sell and barter spirituous liquors without the license required by law," and he was fined $20 with $5 costs.

Mr. Clarke (Cameron & Smart) for the relator, claimed that the defendant should be unseated, the defendant having forfeited his seat under 32 Vic. (Ont.) cap 32, secs. 17, 22, 25.

*W. S Smith* shewed cause, contending that the act did not cover a case where the election or qualification of the defendant was not called in question, but only matters subsequent thereto; and he alleged matters against the conviction not necessary to be noticed here.

Mr. Dalton.—The only cause alleged by the relator for unseating the defendant is the above conviction.

This proceeding, in the nature of a *quo warranto* summons, is entirely statutory. Section 130 of the Municipal Act contemplates the case of the *validity of the election* being contested, and sec. 131, which prescribes the proceeding for the trial, enacts, that if the relator shows by affidavit to the judge reasonable grounds for supposing that the election *was not legal*, or, *was not conducted according to law*, or, *that the person declared elected thereat was not duly elected*, the judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested; and, throughout the subsections of sec. 131, the language is consistent It is said in subsec. 9: *The judge shall in a summary manner upon statement and answer, without formal pleadings, hear and determine the validity of the election.*

Now from the time of his election and acceptance of office to the 24th January, the defendant properly filled the office, because, 1st, the election was legal; 2nd, it was conducted according to law, and 3rd, the defendant declared elected thereat was duly elected. The election was therefore valid, but by his conviction on that day it is alleged that the defendant forfeited his office, which till then he had rightly held. By the 17th sec. (Statutes of Ontario), 82 Vic. cap. 32, it is provided "If any member of any municipal council shall be convicted of any offence under this Act, (which this conviction is), he shall *thereby* forfeit and vacate his seat, and shall be ineligible to be elected to, or to sit or to vote in any municipal council for two years thereafter, &c."

Whether such a case would, or would not, be within secs. 120, 124 & 125 of the Municipal Act, no doubt the law affords an appropriate remedy, but the present proceeding is, by express language of the Act, as it seems to me, confined to cases which exclude the cause now alleged, as an objection against the defendant's election.

Judgment should therefore be for the defendant, with costs.

*Judgment for defendant with costs.*

## COMMON LAW CHAMBERS.

### Roche v. Patrick

*Change of venue—Balance of convenience—Fair trial.*

An application to change the venue in an action of libel to a county where the cause of action arose and the witnesses resided, and whereby there would be a great saving of expense, was opposed on the ground that a fair trial could not be had in such county, owing to alleged prejudices against the plaintiff, arising from a political excitement occasioned by an election held there three years previously.

*Held*, that the venue must be changed: the action being for a private injury and not a matter of public interest, and the probabilities of the case being against the belief that a fair trial could not be obtained, as alleged, and the preponderance of convenience and expense being greatly in favor of the change.

[Chambers, March 8, 1870, *Mr. Dalton.*]

This was an application by the defendant to change the venue from the County of Frontenac to the united Counties of Leeds and Grenville.

The action was for libel, the plaintiff being the Parish Priest of the Parish in which Prescott is situated. The pleadings in the case were of immense length, there being twenty-four pleas of justification, upon which issues were joined.

The affidavits put in on the motion to change the venue were in substance as follows:—

The defendant's affidavit stated, that the publication consisted in the alleged sale by the defendant, in the Town of Prescott, of a pamphlet containing the libel: that 45 witnesses who lived in Prescott, or the immediate neighbourhood, must be called by the defendant: that (he believed) all the plaintiff's witnesses also resided in the Town of Prescott, or in the immediate neighbourhood: that Brockville is distant not more than 12 miles from Prescott, whereas Kingston is more than 60 miles: that at the trial at Kingston it would cost not less than $350 more than at Brockville for defendant's witnesses and that it must necessarily cost the plaintiff more in like proportion for his witnesses: and "that a perfectly fair and impartial trial can be had in the Town of Brockville, and that such trial can be had at an expense less by $500 or $600 than a trial at Kingston, that is regarding the extra expense to both parties: and that any political excitement caused by the election referred to in the affidavit of the plaintiff's attorney, had long since died away.

The affidavit of the defendant's attorney was to the same effect.

The affidavits on the part of the plaintiff were made by his attorney, and, as far as seemed important, were to the following effect: that shortly before the publication of the alleged libel an election had occurred in the South Riding of Grenville, at which the defendant was a candidate, and against whom the plaintiff voted: that a few weeks after the election the libel in question was published, as was alleged, and publicly sold by the defendant: that the libel was alleged to have been written by one John Gray, and refers to the part which the plaintiff took in the election, and is supposed to have been written on account of the part which the plaintiff then did take: that the plaintiff was a Roman Catholic Priest, and that the part he took in the election, and the influence he was allowed to use over his parishioners had excited a strong feeling against him in the minds of many of the supporters of the defendant: that all these matters were well known throughout the Counties of Leeds and Grenville, and have been referred to in the public journals: that from the above facts the deponent believed that a large number of the people, especially in the South Riding, were prejudiced for or against the parties, and that a fair trial could not then be had, nor a jury selected which would not contain some men prejudiced on the subject of the action, or who would be likely to agree, and that he therefore thought it indispensable to the ends of justice, that the case should be tried in some other county: that he believed the application to be made, because any jury of those counties would be likely to disagree: that the plaintiff's witnesses reside chiefly about Prescott, and that it would be little more expensive to take them to Kingston than to Brockville.

*S. Richards*, Q C., for the defendant, urged that the venue should be changed upon the grounds, that the cause of action arose in Leeds and Grenville: that both parties reside there: that the witnesses on both sides also reside there: and, that a trial at Kingston, besides other inconveniencies, will cost more than one at Brockville to an amount between $500 and $600.

*John Patterson* shewed cause, and opposed the application upon the grounds that it was not made in time; and that on account of the prejudice existing against the plaintiff in Leeds and Grenville upon the matters above mentioned, it would be impossible to obtain a fair trial there

Mr. Dalton —The plaintiff's first objection is, that this application is not made in time. I think, however, that upon the understanding between the attorneys, as explained by the plaintiff's attorney, the state of the record and the facts which have occurred, that it is in time.

Then as to the principal questions which have been argued. I have read all the cases which I have been referred to, and others, I will state the effect of some of them: *Jackson* v. *Kidd*, 8 C. B. N. S. 855; Byles, J., says, "To induce a judge to make such an order (to change the venue), three things are necessary; first, that defendant's witnesses reside at the place to which it is sought to change the venue: secondly, that the plaintiff's witnesses also reside there, and thirdly, that the cause of action arose there;" and in the same case Erle, C. J., says, "the principle by which the judges have been guided since the framing of the Common Law Procedure Act is this,—that if it be made to appear that there will be great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in a trial of the cause at the place to which it is sought to change the venue, the judge is at full liberty to exercise his discretion in the matter, and to make the order if he sees fit."

No doubt the plaintiff is *dominus litis*, and it lies upon the defendant to prove the facts necessary to change the venue from where the plaintiff has laid it. There must be a manifest preponderance of convenience in a trial at the place to which it is sought to change it: *Helliwell* v. *Hobson*, 3 C. B. N. S. 761. All the cases I have referred to on this point are consistent with those I have cited, and now let us apply this rule to the present facts.

Both parties live in Leeds and Grenville; so do the witnesses of both parties. The cause of action arose there, and the difference of expense of trial in the two places must be very considerable. How are these facts met by the case of the plaintiff?

I entirely agree with Mr. Patterson, that if it be reasonably established that a fair trial cannot be had in Leeds and Grenville, that all the above considerations are overborne. Upon this point Mr. Patterson has referred me to an important case, *Penhallow* v. *The Mersey Dock, &c.*, 29 L J. N. S, Ex. 21. It was an action against the Dock Company for the loss of a ship by negligence. It was shown upon the affidavits that the matter had excited great discussion in Liverpool, that almost every merchant and shipowner had made up his mind upon it, and upon the court being urged to restore the venue to Liverpool because the cause arose there the parties and witnesses on both sides residing there, and that much greater expense would arise from the trial elsewhere, the learned Chief Baron said: "all other considerations must give way to that of a fair trial. The learned Baron who tried the former cause is of opinion that this cause could not be fairly tried at Liverpool;" and the court refused the rule. But is there any cause to believe that a fair trial cannot be had in this cause in Leeds and Grenville?

The affidavit of the plaintiff's attorney states his belief that it cannot. The defendant and his attorney are as confident that a fair trial may be had there.

It is necessary to look at the probabilities. The action is for a private injury, not for any matter of public interest, and I cannot bring myself to think that there can be any danger of prejudice arising at the trial from the cause assigned. It would be unfortunate for Canada if the heat of a political contest had such an effect three years after the event, for we have an election every four years. How little the courts have regarded suggestions of prejudice alleged to have arisen from such causes, may be learned from the language of the judges in *Rex* v. *Harris et al.*, 3 Bur. 1330; *Seely* v. *Ellison*, 6 B. N. C. 229; and *Dowling* v. *Sadleir*, 8 Irish Com. Law Rep. 603.

As the balance of convenience is very greatly in favor of a trial at Brockville, and the suggested prejudice to the plaintiff is not established, I must make the summons absolute to change the venue.

*Order accordingly.*

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## Westover v. Brown.

*Striking out issues after demurrer.*

A defendant will be allowed, where the plaintiff's declaration is held bad on demurrer, upon payment of the plaintiff's cost of the application and of the replication, to strike out the issues in fact upon some of the pleas and need not move to rescind the order allowing him to plead several matters.

[Chambers, March 10, 1870, *Mr. Dalton*.]

*F. Osler* obtained a summons on behalf of the defendant to strike out the issues in fact upon some of defendant's pleas, the plaintiff's declaration having been held bad on demurrer.

*J. K. Kerr*, *contra*, objected that the summons should have been to set aside the order allowing the defendant to plead several pleas, and not merely to strike out the issues upon those pleas.

Mr. Dalton—In 1 Wm. Saund. 80 note (1), the editor says:—"It seems to follow that when the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat* shall be entered, notwithstanding there may be also one or more issues in fact, because upon the whole it appears that the plaintiff has no cause of action. So where several pleas are pleaded, since the Stat. 4 & 5 Anne, c. 16, all of them going to destroy the action, and one or more issues are joined upon some of the pleas, and there are one or more demurrers to the rest—if the court determine the demurrers in favor of the defendant *before* the issues are tried they shall not be tried, and if *after* the trial it will make no difference, for in each case judgment of *nil capiat* shall be given against the plaintiff."

But later authorities show that in such case the issues would not be struck out against the will of the defendant, *Beckham* v. *Knight*, 7 Dowl. 409; *Carden* v. *General Cemetery Co*, *ib.* 425. For though the defendant may be entitled to enter judgment of *nil capiat* on the whole record, yet here he is not bound to do so. But if the *defendant* wishes to strike out the issues on his own pleas, it can be but a question of costs.

The order obtained to plead several pleas or to plead and demur, is for the defendant's benefit, and he may waive the advantage to any extent he pleases. He need not plead all the pleas allowed; after he has pleaded them he may move to withdraw them, and he will be allowed to do so upon proper terms, for he does but waive his own right, and the foundation of the order is not meddled with. Should the plaintiff move to strike them out, no doubt he must attack the order which is the authority to the defendant to plead them.

The present application of the defendant to strike out the issues is simply to be allowed to withdraw his pleas, which he should be allowed to do, upon payment of the costs to the plaintiff occasioned by them, that is, the costs of the replication and of his application, to be deducted from the plaintiff's costs.

Courts have gone a good way to prevent the incurring of useless costs. In *MacMartin* v. *Thompson*, 26 U. C. Q. B. 384, the defendant pleaded the general issue, and a special plea, to which latter the plaintiff demurred. On the trial of the issue the defendant succeeded, and the Court having refused to the plaintiff a rule *nisi* for a new trial, would not hear the argument of the demurrer, which had been set down by the plaintiff; for the plaintiff, having failed on the merits could not be allowed to put the defendant to the costs of an argument, for the mere purpose of getting the costs of the demurrer.

In the judgment, the learned Chief Justice suggests this present proceeding as a proper measure for the defendant to take. This was decided after time taken, and the clauses of the C. L. P. Act, as to the acts of several issues, were considered by the Court.

*Order accordingly.*

### Commercial Bank v. Harris.

*Issue Book.*

**Where pleadings are altered in a material point, it is necessary to serve a new or amended issue book.**

[Chambers, March 11, 1870, *Mr. Dalton*.]

*J. G. Scott*, for defendant, applied to set aside the notice of trial in this cause, on the ground that no issue book had been served shewing the existing state of the pleadings.

It appeared that an issue book had been served at an early stage of the suit, but subsequently the pleadings on the files had been altered, some additional pleas having been pleaded, and some of the former withdrawn, and a demurrer had been disposed of before notice of trial was given. Notice of trial was served without a new issue book being served or the old one amended.

*Crooks*, Q. C., shewed cause.

Mr. Dalton—I think on the authority of *Woodruff* v *Watson*, 6 Taunt. 400, that the notice of trial is irregular, for the reasons given, and must be set aside.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

### FOR NOVEMBER AND DECEMBER, 1869, AND JANUARY, 1870.

*(Continued from page 110.)*

Abatement—*See* Executor and Administrator, 2; Legacy, 4.

Account—*See* Appropriation of Payments; Bank; Contract, 1; Foreign Office; Limitations, Statute of.

Action.

An action cannot be maintained for writing to purchasers, or intended purchasers of machines, that such machines infringe the defendant's patents, and threatening legal proceedings in case of the use of such machines without the payment of a royalty, unless it can be shown that the defendant's claim is not *bonâ fide* in support of a right which, with or without cause, he fancies he has.—*Wren* v. *Weild*, L. R. 4 Q. B. 730.

*See* Award, 3; Family Name; Limitations, Statute of, 4.

Administration—*See* Executor and Administrator.

Admiralty—*See* Bail; Costs, 4; Damages, 2, 3; Principal and Agent; Salvage; Statute.

Adultery—*See* Connivance.

Affidavit—*See* Misdemeanor.

Agent—*See* Contract, 1, 2; Principal and Agent; Privileged Communication.

Agreement—*See* Contract.

Alimony.

By the practice of the Ecclesiastical Courts, more than one moiety of the joint income cannot be allotted to a wife after a decree of judicial separation, although she may have brought more than one moiety of the property into settlement.—*Haigh* v. *Haigh*, L. R. 1 P. & D. 709.

Annuity.

A testator gave an annuity which he directed to be paid by his son; and subject and charged with the payment of his debts, legacies, and the annuity, he left his real and personal property to his son. On bill filed by the annuitant to enforce payment: *Held*, that he was not entitled to a receiver, as he could help himself by distress under St. 4 Geo. II. c. 28.—*Sollory* v. *Leaver*, L. R. 9 Eq. 22.

*See* Executor and Administrator, 2; Will, 2, 6.

Appeal.

There is no settled rule that when one party to an administration suit has appealed, any other party may insist on having the decree varied in his favor.—*Pardo* v. *Bingham*, L. R. 4 Ch. 735.

*See* Limitations, Statute of, 3.

Apportionment.

C. covenanted and gave bond to pay a fund three months after his decease in trust for a tenant for life and remainder-man, with interest from the date of his death until payment. Several years after C.'s death, it appeared that there were some assets, but less than the principal fund. *Held*, that the sum must be calculated which would amount, at four per cent. from C.'s death, to the assets on hand, and the difference paid to the tenant for life.—*Cox* v. *Cox*, L. R. 8 Eq. 343.

Appropriation of Payments.

A., an attorney, having £5,000 to invest for B., a client, paid it to his own general account at his banker's, and afterwards drew out more than that amount and his previous balance, and paid in considerable sums. He died not having invested the £5,000, and with a balance at the bank of £2,700. *Held*, that the sums drawn out must be set against those paid in in the order in which they were paid in, and that B. could not restrain A.'s administrator from dealing with the balance.—*Brown* v. *Adams*, L. R. 4 Ch. 764.

Arbitration—*See* Award.

Assignment—*See* Priority; Stoppage in Transitu.

Assumpsit—*See* Fraud.

Attorney—*See* Appropriation of Payments; Limitations, Statute of, 8; Solicitor.

Attorney-General—*See* Railway, 8.

Award.

1. The plaintiff, S, agreed to row a race with K., each to deposit a stake with the defendant, and "the decision of the referee to be final." There was a default in the start, and the referee, who had power to interfere in that event, ordered K. to inform S. that if he did not start, K. was to row over the course without him. K. rowed over the course, and, as the jury found, without communicating this order to S., or giving him an opportunity to start. The referee, who could not see what occurred between K. and S., without any inquiry, and against the protest of S.'s umpire, ordered the stakes to be paid to K. *Held*, that, as the court could see that the question whether K. communicated his order to S. had not been passed on by the referee, and as K. did not do so in fact, there was no race, and the referee had no jurisdiction to award the stakes, and that S. was entitled to recover his deposit. (Exch. Ch )—*Sadler* v. *Smith*, L. R. 5 Q B. 40; s. c. L. R. 4 Q. B. 214; 3 Am. L. Rev. 682.

2. The umpire in whose discretion were the costs of the submission, reference, and award, awarded a sum to one party, and directed him to pay the costs of the other party, which were double the sum awarded. *Held*, that this was no ground for setting aside the award.—*Re Fearon & Flinn*, L. R. 2 C. P. 84.

3. Suit for £400. Plea, by way of estoppel, as to all over £145; an award, not alleged to be satisfied, of £145 in favor of the plaintiff for the same cause of action. Demurrer. *Held*, that the plea was a good bar.—*Commings* v. *Heard*, L. R. 4 Q. B. 669.

Bail.

1. A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board, a portion only of which remained on board at the time of the arrest. The vessel and cargo belonged to the same owner. On motion for release of the portion of the cargo remaining on board: *Held*, that the freight due upon the whole must first be paid into court.—*The Roecliff*, L. R. 2 Ad. & Ec. 363.

2. A vessel was arrested in a cause of collision, having been herself injured by the collision. She was afterwards repaired and much increased in value. On motion for her release on bail: *Held*, that she ought to be released on bail being given to the amount of her value at the time of her arrest.—*The St. Olaf*, L. R. 2 Ad. & Ec. 360.

Bailment—*See* Telegraph.

Bank.

A railway company having general and special accounts with a bank was credited with a sum "Per Loan," and drew cheques against it which were entered under the head "Loan Account." The company became insolvent, and the claim of the bank was disputed as being for an unauthorized loan. *Held*, that the above was not a loan, but merely an overdrawn account.—*Waterlow* v. *Sharp*, L. R. 8 Eq 501.

*See* Trust, 1; Will, 9.

Bankruptcy.

1. A payment of a sum by a sub-tenant to release his goods, lawfully distrained for rent due from the tenant to the landlord, does not create a liability from the tenant to the sub-tenant "by reason of any contract or promise, to a demand in the nature of damages," which is barred by the tenant's discharge in bankruptcy.—*Johnson* v. *Skafte*, L. R. 4 Q. B. 700.

2. After an order *nisi* in a divorce suit, dissolving the marriage, and ordering the co-respondent to pay damages and costs, the co-respondent made away with his property, and shortly after the order was made absolute, became bankrupt. *Held*, that he was not guilty of contracting a debt without reasonable expectation of being able to pay it, within the Bankruptcy Act, 1861, s. 159.—*Ex parte Clayton*, L. R. 5 Ch. 13.

3. A solicitor, who had been solicitor to a former assignee, but who was attending at the Bankruptcy Court for another party, was examined, without having been summoned, as to his receipts on account of the estate. He admitted receipts, and claimed deductions, but

was told to pay over the full sum received. Afterwards, and without notice to him, an order was made to that effect. *Held*, that the order must be discharged as made without giving the solicitor a proper opportunity to defend himself.—*Ex parte Prance*, L. R. 5 Ch. 16.

*See* Partition, 1; Priority; Winding Up.

**Beer House.**

A covenant not to use a house as a "beer house" is not broken by the sale, under a license, of beer, by retail, not to be drunk on the premises.—*London & N. W. Railway Co.* v. *Garnett*, L. R. 9 Eq. 26.

**Bill of Lading.**

By the bill of lading for a quantity of sugar the ship-owner was "not liable for leakage." The sugar, in consequence of improper stowing, was damaged during the voyage by the drainage from other sugar stowed above, which caused it to heat. *Held*, that this was not damage by leakage, and the owners were liable to the consignee.—*The Nepoter*, L. R. 2 Ad. & Ec. 375.

*See* Ship, 1; Stoppage in Transitu.

**Bills and Notes.**

Plaintiff, having agreed to receive a company's acceptance for a debt due him if two directors would indorse it, went to the office of the company and received a bill which directors A. and B., who were in the habit of attending there, indorsed at the time. The bill was dishonored, and notice was sent to A. at the office of the company. *Held*, that the notice was sufficient. The office was A.'s place of business for the purpose of this transaction.—*Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639.

*See* Evidence, 1; Payment; Trust, 1.

**Bond.**

1. Railway bonds represented that the company was indebted to L. in an amount there stated; they were given for the purpose of being deposited by him as security for advances to be made. The money obtained by the deposit was in part applied to payment of debts of the company. St. 7 & 8 Vic. c. 85, s. 19, imposes penalties on a company for giving loan-notes or securities. *Held*, that, so far as the company had had the benefit of the money obtained, as above, for its legitimate purposes, the bondholders had a valid claim against its assets.—*In re Cork and Youghal Railway Co.*, L. R. 4 Ch. 748.

2. A., the nominal plaintiff, received from a company of which he was a member, in part payment of a debt due from them, £32,000 in their debentures of £100 each, expressed to be payable to him or his assigns. Some of these he assigned to B. and some to C., the real plaintiffs, and transfers to them were registered on the company's books. They also received certificates that they were "registered proprietors," and were dealt with by the company as such. The company then made a mortgage to A. in trust for the "holders for the time being" of the debentures unpaid. Afterwards A. became the debtor to the company, who by their articles had a primary lien on the debentures of any members liable to them. The question was, whether the company were equitably entitled to set off A.'s debt to them in suits on the debentures assigned to B. and C. *Held*, that they were not.—*Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387.

*See* Bottomry Bond.

**Bottomry Bond.**

1. The extent of the authority of the master of a vessel to bind the owners, either of the ship or of the cargo, is derived from, and bounded by, the law of the flag.

When the master fails to obtain funds from the owners of the ship or cargo, he is authorized to raise money to pay for necessary repairs and supplies, after such supplies and repairs have been furnished, by giving a bottomry bond on ship, freight, and cargo to persons other than those who have furnished the repairs and supplies, when by the *lex loci* these latter persons have a lien on the ship for their claim.

The court being of opinion that certain advances made by the charterer, and indorsed on, but not stipulated for, by the charterparty, were, as between him and the owners, advances of freight: *Held*, that the master's bond did not give the obligee a right to demand more freight than the master could have.—*The Karnak*, L. R. 2 P. C. 505; s. c. L. R. 2 Ad. & Ec. 298; 3 Am. L. Rev. 685

2. A. was the owner of a vessel, and insolvent; B. was the first mortgagee; C. was the second mortgagee, and knew these facts, and that A. and B., as well as himself, lived at Liverpool. C.'s agents at Cuba were applied to for further advances to the vessel on bottomry, telegraphed to C., and by his authority made the advances, there having been no communication with A. or B. *Held*, that the bond was invalid, because, under the particular circumstances, C. should have communicated with A.—*The Panama*, L. R. 2 Ad. & Ec 390.

3. A bottomry bond was given for payment "in case of the loss of the ship" of "such an

average as by custom shall have become due on the salvage, or if on the said voyage, the said ship shall be utterly lost, cast away, or destroyed," then the bond was to be void. The vessel was sold before the end of the voyage under circumstances which would, as between insurers and insured, constitute a constructive total loss. The proceeds were less than the amount of the bond. *Held*, that the bondholder was entitled to them.—*The Great Pacific*, L. R. 2 Ad. & Ec 381; s. c. L. R. 2 P. C. 516.

CARRIER—*See* NEGLIGENCE, 2, 3; RAILWAY, 1; SHIP, 1; TELEGRAPH.

CASES OVERRULED—*See* CONTRIBUTION.

CHARITY.

In 1558 a testator devised realty to "the Master, Wardens and Comonaltie of the *Misterie of the Wax Channdlers* . . . for this entent and purpose, and upon this condicon, that they shall yerely distribute" £8 as follows: £7 15*s*. to charities, 5*s*. to the Master and Wardens for the time being equally, "and the rest of the profits . . . I will shall be bestowed upon the reparacons of the said houses and tenements. And yf the Master, Wardens, and Comonalltye . . . do leave any of these things ondonne . . . then I will that the next of Kynrid unto me . . . shall enter the said tenements . . . and holde unto him and unto his heirs for ever upon condicon that he and they and every of them do all these things." About the date of the will the whole income was £9 4*s*. It had since much increased. *Held*, that the company was entitled to the surplus.—*Attorney-General* v. *Wax Chandlers' Co.*, L. R. 8 Eq. 452.

*See* MORTMAIN; WILL, 13.

CHURCH—*See* VOLUNTARY ASSOCIATION.

CODICIL—*See* WILL, 1.

COLLISION—*See* BAIL; COSTS, 4; DAMAGES, 2, 3; SHIP, 2.

COMMISSION.

A commission was issued to examine the surviving witness of a will, on affidavit that he was sixty-six years old, and frequently suffered from ill-health.—*Brown* v. *Brown*, L. R. 1 P. & D. 720.

COMMON CARRIER—*See* NEGLIGENCE, 2, 3; RAILWAY, 1; SHIP, 1; TELEGRAPH.

COMPANY.

1. The directors of a company had power to buy the business of a firm of bill-brokers on such terms and taking such guarantee as they might think fit. A deed of transfer was made, and was referred to in the prospectus; but, by a second deed, doubtful debts of such amount that the firm was then insolvent were retained by the firm for collection, and payment of the balance uncollected after a certain time, was secured only by the firm's personal guaranty. The second deed, and the facts rendering the purchase imprudent, were not disclosed to the shareholders. A bill was filed by the company against the directors, alleging loss of capital and loss from liabilities incurred through their breach of duty, but not charging fraud. *Held*, that there was a remedy in equity for loss of capital only, and that as to that, the purchase, the taking of personal security only, and the secret deed, were all within the powers of the directors as against the company.—*Overend, Gurney & Co.* v. *Overend*, L. R. 4 Ch 701.

2. Directors of a company authorized to invest in securities, applied on its behalf for shares in another company, on the understanding that they were not really to take more than their share of what remained untaken by the outside world. For the shares so taken £30,000 was paid out of the company's funds. They also received five hundred shares for an agreement not to sell the former ones under a certain rate for a time. *Held*, *ultra vires*, and the payment a breach of trust.

One director, who merely wrote two letters protesting against the scheme, but was present at the meetings, before and afterwards, was charged, although he was not an allottee, and did not sign the cheques for said £30,000. So one not at the original meeting, but who signed one of the cheques, and was party to the subsequent transactions. Bill dismissed, without costs, against one who was present at none of the meetings. Also against a secretary and assistant manager.—*Joint Discount Co.* v. *Brown*, L. R. 8 Eq. 381.

3. It being necessary, to start the A. company, that forty thousand shares should be taken, and A. being prohibited to buy its own shares, the C. bank discounted the notes of B., the purchaser, for the necessary sum, by crediting that sum to A. on its books, and A., as soon as organized, gave a guarantee to leave with C. an amount equal to the notes of B. remaining unpaid. The sum so credited to A. was applied by C. to B.'s bills; but C., to procure for A. a settling day on the Stock Exchange, certified that the sum had been deposited with them in payment of shares. A shareholder of A. filed a bill against the directors of A. and against C. *Held*, that A.'s guarantee was *ultra vires*, and that C., having participated in the breach of trust, must refund the amount

applied to B.'s bills.—*Gray* v. *Lewis*, 8 L. R. Eq. 526.

4. A shareholder in the L. Co., who had subscribed for twenty-five shares in the C. Co., received four hundred and seven-nine paid-up shares as shareholder in the L. Co. *Held*, that this satisfied the subscription.—*Drummond's Case*, L. R. 4 Ch. 772.

*See* BANK; BILLS AND NOTES; BOND; ILLUSORY SUIT; WINDING UP.

CONDITION—*See* CHARITY; WILL, 1.

CONFLICT OF LAWS—*See* BOTTOMRY BOND, 1; DOMICILE; EXECUTOR AND ADMINISTRATOR; LIMITATIONS, STATUTE OF, 1, 2.

CONGREGATION—*See* MINISTER.

CONNIVANCE.

A separation deed, with the facts, was *held* not to prove the wife's connivance at the husband's adultery. *Semble*, a consent, although unwilling, on her part, for the sake of getting the allowance, would be connivance.—*Ross* v. *Ross*, L. R. 1 P. & D. 734.

CONSIDERATION—*See* STOPPAGE IN TRANSITU.

CONSTRUCTION—*See* BANKRUPTCY, 1, 2; BEERHOUSE; BILL OF LADING; BOTTOMRY BOND, 3; COMPANY, 2; CONTRACT, 3; COPYRIGHT; LEGACY, 3, 4; LIMITATIONS, STATUTE OF, 2; MARRIAGE SETTLEMENT; MORTGAGE, 1; PLEADING; POWER, 1, 2; RAILWAY, 1; REVOCATION OF WILL; STATUTE; VENDOR AND PURCHASER, 1; WILL, 2-18.

CONTEMPT.

Publishers of a newspaper, in which a petition for winding up a company, containing charges of fraud against the directors, was printed *in extenso* before the hearing of the petition, were made to pay the costs of a motion to commit for contempt of court.—*In re Cheltenham and Swansea Railway Carriage and Wagon Co.*, L. R. 8 Eq 580.

CONTINGENT INTEREST—*See* WILL, 6.

CONTRACT.

1. A., an army agent, to secure balances from time to time due to him from B., an officer, took out and paid for policies on B.'s life, but charges B. in his books with the premiums paid, and credited B. with a sum refunded. A. also drew on B. for round sums, more than the balance due from B. including the premiums, and B. accepted the bills, which were afterwards dishonored. No account had been sent to B. charging him with the premiums. *Held*, that after payment of A.'s debt, the rest of the proceeds of the policies belonged to B.'s estate.—*Bruce* v *Garden*, L. R. 8 Eq 430; s. c. *reversed*, L. R. 5 Ch. 32.

2. A. was hired by B. to serve as farm bailiff, at weekly wages, with certain bonuses, and a residence in a farm-house; the service to continue until six months after notice, or payment of six months' wages. B. died. *Held*, that B.'s administratrix was not bound to continue A. in her service, or pay him six months' wages. The death of either party to a contract founded on personal considerations dissolves it.—*Farrow* v. *Wilson*, L. R. 4 C. P. 744.

3. A building contract was made terminable by a board in case the contractor "shall not, in the opinion and according to the determination of the said architect, exercise due diligence, and make such due progress as would enable the works to be" completed by the specified time. The architect certified *bonâ fide* that the contractor was not exercising due diligence, and the board terminated the contract. *Held*, that the contractor was bound by the architect's decision, although the board caused the delay.—*Roberts* v. *Bury Commissioners*, L. R. 4 C. P. 755.

*See* BILL OF LADING; BOND; BOTTOMRY BOND; COVENANT; DAMAGES, 1; FRAUDS, STATUTES OF; HUSBAND AND WIFE; INTEREST; LIMITATIONS, STATUTE OF, 1, 2; MINISTER; NEGLIGENCE, 1; RAILWAY, 2, 3; REFORMATION OF INSTRUMENTS; SALE; SALVAGE; SHIP, 1; STOPPAGE IN TRANSITU; TELEGRAPH; TRUST, 1; VENDOR AND PURCHASER OF REAL ESTATE.

CONTRIBUTION.

A testator gave pecuniary legacies, and then devised real estate to his wife for life, and after her death with all the residue of his real and personal estate in trust for his niece for life, with remainder to her children. The personal estate was insufficient to pay the debts. *Held*, that the pecuniary legatee could not make the residuary devise contribute to the payment. *Hensman* v. *Fryer*, L. R. 3 Ch. 420; 3 Am. L. Rev. 101; *denied*.—*Collins* v. *Lewis*, L. R. 8 Eq. 708.

COPYRIGHT.

St. 25 & 26 Vict. c. 68, s. 1, giving a copyright to "the author of every original painting, drawing and photograph, and his assigns," gives a copyright in a photograph from an engraving of a picture.

By s. 5, and by 5 & 6 Vict. c. 45, s. 14, "if any person shall deem himself aggrieved," he may apply to have the entry of the copyright expunged from the register. W., who had been convicted of infringing G.'s copyright on the evidence, *inter alia*, of a copy of the entry of G.'s title, applied to the court to expunge the entry. W. did not set up any title in himself. *Held*, that W. was not a person "aggrieved" within the acts.—*Graves' Case*, L. R. 4 Q. B. 715.

Costs.

1. A trustee's costs of paying a fund into court under the "Trustees' Relief Act," are payable out of the *corpus*; his costs of appearing on a petition for payment of dividends are payable out of income.—*In re Whitton's Trusts*, L. R. 8 Eq. 352.

2. When a testator has given a fund to trustees to be invested in land which is to be settled on A., B., and C. successively for life, and the fund is paid into court in an administration suit, and has not been invested in land, the costs of a petition by the tenant for life for payment of the dividends to him are payable out of the *corpus*.—*Scrivener* v. *Smith*, L. R. 8 Eq. 310.

3. When a plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, proceedings will be stayed until payment of such costs.—*Cook* v. *Hathaway*, L. R. 8 Eq. 612.

4. In a cause of damage by collision, defendants pleaded and proved that the collision was caused by the fault of a pilot whom they were compelled to employ. The plaintiffs were condemned in costs.—*The Royal Charter*, L. R. 2 Ad. & Ec. 362.

5. A husband who was condemned in his wife's costs in a suit by her for dissolution, which was decreed, was allowed to deduct therefrom the amount which he had paid for her costs in a previous suit for nullity of marriage, which had failed.—*Ditchfield* v. *Ditchfield*, L. R. 1 P. & D. 729.

*See* Award, 2; Contempt; Cruelty; Damages, 3; Inspection of Documents; Tender.

Covenant.

After life-estates in A. and B., A. had a power to appoint £5,000 by will among his children (C., D., E., F., and G.) In default of appointment, or subject to any such as should not be a complete and entire disposition of the whole sum, the fund was to go to said children, to vest at twenty-one or marriage. C. died over twenty-one. D. afterwards reached twenty-one, and married, and A. then covenanted to appoint one fifth of the fund in D.'s favor. A. died without having appointed. There was claimed for D. £1,000 under the covenant, and one fifth of the residue as not disposed of. *Held*, that D. was entitled to only £1,000. *Semble*, the covenant was void.—*Thacker* v. *Key*, L. R. 8 Eq. 408.

*See* Beer-house; Marriage Settlement; Railway, 2, 3.

Creditor—*See* Partnership.

Criminal Law—*See* Forgery; Larceny; Misdemeanor; Venire de Novo.

Cruelty.

A wife, shortly after marriage, was found to be affected with syphilis. Her virtue was unquestioned, but the husband swore that he had never had the disease, which was only contradicted by inference from the state of the wife. The jury found the husband guilty of cruelty. *Held* (Willes, J., *dissentiente*), that the evidence did not support the finding. Rule absolute for a new trial on payment of costs.—*Morphett* v. *Morphett*, L. R. 1 P. & D. 702.

Custom—*See* Sale.

Damages.

1. Defendants, mortgagees of a leasehold, sold it to plaintiff, possession to be given on completion of the purchase. The plaintiff re-sold, at an advance of £105, to G. There was no failure of title, as in *Flureau* v. *Thornhill*, 2 W. Bl. 1078; but the mortgagor, who was in possession of the premises, refused to give them up. Thereupon the defendants declined to complete the sale, although they could have ousted him. *Held*, that the plaintiff could recover, besides the deposit and expenses of investigating the title, the difference between the contract price and the value at the time of the breach; and that the advance on the re-sale was evidence of this in the absence of other proof. (Exch. Ch.)—*Engell* v. *Fitch*, L. R. 4 Q. B. 659; s. c. L. R. 3 Q. B. 314; 3 Am. L. Rev. 95.

2. The owners of a ship taking advantage of St. 25 & 26 Vict. c. 63, s. 54, to limit the damages payable by them, for a collision, to £8 for each ton of the ship's tonnage, may be held to pay interest from the date of the collision on the amount recovered.—*The Northumbrian*, L. R. 3 Ad. & Ec. 6.

3. So, where damages by such means were reduced below the sum which usually carries costs in the admiralty, but the damage suffered and the amount claimed were above that sum, the plaintiff was allowed costs.—*The Young James*, L. R. 3 Ad. & Ec. 1.

*See* Vendor and Purchaser of Real Estate.

Death—*See* Contract, 2.

Debenture—*See* Bond.

## DIGEST OF ENGLISH LAW REPORTS.

**Dedication.**

As far as living memory went, the occupier of a field, crossed by a foot-path, had been wont, in the due course of farming, to plough it up, and so to destroy the foot-path for the time being. There was no evidence of the existence of the foot-path before living memory. *Held*, that the owner must be presumed to have dedicated this way to the public, subject to the right of ploughing it up.—*Mercer* v. *Woodgate*, L. R. 5 Q. B. 26.

**Deed**—*See* Forgery; Marriage Settlement; Registry of Deeds.

**Desertion.**

A husband, not having cohabited with his wife, or provided a home for her, gave her £100 on her agreeing not to molest him in future by insisting on her right to live with him. They never cohabited afterwards. *Held*, that the husband had not been guilty of desertion.—*Buckmaster* v. *Buckmaster*, L. R. 1 P. & D. 713.

**Discovery.**

A. filed a bill against B., C., and others, stating that B. married C., by whom he had "one son only, namely," A., and that A. was "the first and only son of" B., and as such was entitled to certain property as tenant in tail in remainder; that an indenture, to which B. was a party, recited that there was, in 1860, "one child only of the marriage of the said B. and B.," meaning A.; that the defendants, except C., pretended that A. had no interest in the estate, but refused to discover the grounds of such pretences, and that the estate had been sold. Prayer for account and other relief. Interrogatives filed. Plea to all the relief and discovery that A. was not the son of B. *Held*, that, taking the bill and interrogatories together, the plaintiff was entitled to discovery (as to the deed, and as to the allegation that he was a child, and the only one of the marriage), and the plea was overruled; but not on the ground that it was negative or to the person.—*Wilson* v. *Hammonds*, L. R. 8 Eq. 323.

*See* Privileged Communication, 1.

**Distress**—*See* Annuity.

**Divorce**—*See* Connivance; Costs, 5; Cruelty; Desertion.

**Domicile.**

Domicile of choice is a conclusion of law from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time. It is not a question of nationality.

One whose domicile of origin was Scotch, and who for many years held a medical appointment in India, was *held* to have acquired a domicile in Jersey on the facts. (Residence for twenty-five years until death; provisions for favorite grandson residing there; removal of children to a tomb there; stock of wine; making a will under advice that it would not be good unless he were domiciled in Jersey.)—*Haldane* v. *Eckford*, L. R. 8 Eq. 631.

**Dower.**

A testator, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of his widow. *Held*, that the widow was deprived of her right to dower by the Dower Act, 3 & 4 Will. IV. c. 105, s. 9.—*Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466.

**Easement**—*See* Dedication.

**Entries**—*See* Evidence, 2.

**Equitable Assignment**—*See* Priority.

**Equitable Conversion**—*See* Legacy Duty.

**Equitable Mortgage**—*See* Interest.

**Equitable Plea**—*See* Set-off.

**Equity**—*See* Company, 1; Foreign Office; Fraud.

**Equity Pleading and Practice.**

1. To protect a bill from demurrer for want of equity it is not enough to allege generally that the defendant holds a fund in trust for the plaintiff. The facts must be set forth which establish that conclusion.—*Grenville-Murray* v. *Earl of Clarendon*, L. R. 9 Eq. 11.

2. Whether an order of court is necessary to enable a married woman who is sued as a *feme sole* to file a plea of coverture, *quære*.—*Heygate* v. *Thompson*, L. R. 8 Eq. 354.

*See* Appeal; Contempt; Costs, 1-3; Discovery; Illusory Suit; Partition, 1; Patent, 1; Railway, 3; Trust, 2.

**Estoppel**—*See* Award, 1, 3; Bond.

**Evidence.**

1. Evidence that B. had previously paid a bill accepted in his name by A., A. not having any general authority to accept bills for B., is immaterial, in the absence of an allegation that the plaintiff discounted the bill on the faith of the signature being that of B.—*Morris* v. *Bethell*, L. R. 4 C. P. 765.

2. Entries over a century old made by the steward of a predecessor in title of the plaintiffs, and setting forth payments to him of rent for certain land from predecessors of the defendants, are admissible to prove the plaintiff's title.—*Gifford* v. *Williams*, L. R. 8 Eq. 494.

*See* Commission; Frauds, Statute of; Negligence, 2; Privileged Communications; Will, 12.

Executor and Administrator.

1. The deceased died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in Ireland, but no grant was made in Englank. The will of the sole executor of the husband was proved in Ireland, and resealed in England. *Held*, that the executor under the last-mentioned will was not entitled to administration of the goods of the deceased.—*Goods of Gaynor*, L. R. 1 P. & D. 723.

2. In the course of administration of an insufficient estate, there being a legacy, life-annuities, and an annuity to A. for life, with remainder to B. for life, before further consideration of the cause, A. and some other annuitants had died. *Held*, that in fixing the proportions in which the annuities were to abate, the value of B.'s annuity was the present value with arrears since A.'s death.—*Potts* v. *Smith*, L. R. 8 Eq. 683.

*See* Apportionment; Contract, 1, 2; Legacy, 1, 2; Trust, 2.

—*American Law Review.*

## GENERAL CORRESPONDENCE.

### *Clerk of the Peace—Fees—Adjourned Sessions.*

To The Editors of the Law Journal.

Gentlemen,—At the first meeting of the "Board of Audit" for the County of Waterloo, held under the recent Act 33 Vic. cap. 8, of which Board the writer is a member, the Clerk of the Peace had in his account the following item, viz.: "To attending seven adjourned sessions and making up record of each at $2.50=$17.50," which caused considerable discussion and was finally allowed by a majority of votes, one member of the Board dissenting.

The Minute Book of the Court of General Sessions of the Peace for the County of Waterloo, kept by the Clerk of the Peace, shows that the Court held last December had been adjourned seven times before it rose, viz.:—

On the 14th day of December the Court met for the transaction of general business; during that day the Clerk of the Peace brought into Court the Jurors' Book under the 89th section of the U. C. Jurors' Act—the Court after deciding as to a full Jury list, found that the selecting of Jurors could not be proceeded with "immediately" as there were civil and criminal cases for trial which were supposed, and subsequently proved, to occupy the whole of the first day, and as there was certain business such as auditing of accounts and the reading of Certificates for Naturalization of Aliens, the former of which requiring to be commenced on the second day of the Sessions, the latter to be read a second time on the last day of the General Sitting of the Court—an adjournment took place in the evening until the following day, 15th December. On that 15th December the general business of the Session was completed, the Court commenced the selection of Jurors and again adjourned to the 16th December for the purpose of continuing the selection of Jurors. On the 16th December the Court again met in open Sessions pursuant to adjournment, sat all day and adjourned to the 17th December; it again met in open Session on the 17th December pursuant to adjournment, sat all day and adjourned to the 21st December; then again met in open Sessions pursuant to adjournment, and so on for three days more till the Court rose.

The question arose whether the Clerk of the Peace was entitled to a fee for adjourning a Court from day to day and making up record of each adjourned sittings.

One of the members of the Board of Audit held that the Clerk of the Peace was not entitled to any of said adjonrnment fees, holding that an adjournment mentioned in the Tariff of Fees did not mean one held from day to day; another member of that Board maintained the very opposite and expressed himself in favor of allowing the item of $17.50 as charged by the officer, while the third Auditor entertained some doubts, but finally voted in favor of allowing the same; thus giving the individual the benefit of his doubt; and as this is considered a sound principle in Criminal Law, it is probably also sound in civil matters.

The Tariff of Fees for Clerks of the Peace, as framed by the Superior Court Judges in Trinity Term, 1862, has the following, under which the above-mentioned charge of $17.50 is made, viz.: No. 66, "*Attending* each *adjourned or special sessions and making up record thereof*, $2.50," to be paid out of the County funds to the Clerk of the Peace. The

Tariff of 1862 appears to be an amendment to the Tariff framed by the Judges in Michaelmas Term, 1845, in which the Judges ordered: "That besides the fees set down in that Table, the several Officers will be entitled to receive fees for other services rendered by them respectively, which are not mentioned in that Tariff, wherever specific fees for such services are fixed by any Statute." Webster's Dictionary explains the word "*adjourn*" to signify, to suspend business to another day or for a longer period.

Blackstone, Vol. I., page 186, says: "An *adjournment* is no more than a continuance of the Session (of Parliament) from one day to another, *as the word itself signifies*." He no doubt understood French and hence the meaning of "ajourner" and of "ajournement."

In Burn's Justice, Vol. V., it is laid down that the proper caption and style of an adjourned Session is thus:—

"Be it remembered that at the General Sessions of the Peace of Our Sovereign Lady The Queen, holden in and for the County of ———, at ——— in the said County, on ——— the —— day of ———, A. D. 18—, before ——— and ———, Esquires, and others, their fellow Justices of the Peace of Our said Lady, the said General Sessions were continued by them the said Justices by adjournment until ——— the —— day of ———, A. D. 18—, and at an adjourned Sessions then accordingly held by adjournment on the —— day of ———, A. D. 18—, before ——— and ———, Esquires, and others, their fellow Justices, &c." In another part of Burn's Justice it will be found that where there is an equal division of Justices, or from any other good cause no judgment is given, an adjournment should be entered by the Clerk of the Peace, that the Justices may resume the consideration at an adjourned Sessions.

The principal points advanced against allowing the charge for adjournments were: that the literal meaning of the word was not contemplated by the Tariff; that an adjournment from day to day did not entitle the Clerk of the Peace to the fee in No. 66 of said Tariff, and that that fee was only to be allowed when the Court adjourned for a longer period, as from week to week or the like.

While on the other hand and in favor of allowing said charge it was contended that the fee mentioned in the Tariff, being given without qualification, the Auditors were justified in giving it a liberal construction: that if it were conceded that for an adjournment from week to week the fee in the Tariff should be allowed, that there is no difference in principle or in law, whether the adjournment of the Sessions were for one day or for one week, and the common sense view was to allow the officer for making up the record of each adjournment, and that therefore the charge made by the Clerk of the Peace should be allowed.

Will you, gentlemen, kindly give your valuable opinion on the above subject, as no doubt many of your readers are interested in the same, and as it would be very desirable for future occasions to have so weighty an opinion as one from you bearing on the same.

I may add that, on enquiry, I am credibly informed, that in the Counties of Wellington and Middlesex the Clerks of the Peace are allowed $2.50 *for each and every day* there is an adjourned Sessions, whether for selecting Jurors or otherwise.

Respectfully yours, Otto Klotz.

[We have much pleasure in inserting the above letter. Mr. Klotz has ably and we think very fairly argued out the position he takes, and whatever may be thought as to the strict law every one who has any knowledge of the duties of the office will readily admit that the most favorable construction of the tariff gives but a poor compensation to the officer.

We should like to hear what answer, if any, could be given to the arguments advanced by Mr. Klotz. But so far as the matter is before us we must, without at present committing ourselves to an opinion on the point, think that a strong case has been made out by that gentleman. The narrow construction contended for was, we think, rightly overruled by the Board, until at least there is an authoritative decision on the point.

We have always taken ground against the payment of officers of justice by fees—that is, in cases where a salary could be estimated for or fixed. A fixed salary for general duties at least would save much labour in audit, and avoid unseemly contentions, which must be very unpleasant to officers. It is not an agreeable occupation to be contending, quarter after quarter, for one's rights; and, whatever may be the case in the future, we fear that in the past justice was not always done to officers.
—Eds. L. J.]

## REVIEWS.

The Canadian Parliamentary Calendar and Directory, 1870. Edited by H. J. Morgan, Ottawa: printed by Bell & Woodburn, Elgin Street.

Mr. Morgan, the Editor of the *Canadian Parliamentary Companion*, has done good service in issuing a *Parliamentary Celendar*. The one is a twin book to the other. Each contains in convenient form, information useful and necessary for members of the Canadian Parliament and others who take an interest in the public affairs of Canada.

This is the first year for the publication of the Calendar; but if at all successful, the editor promises that it shall be issued annually. Year by year it will, if continued, be of increased value as a history of the Dominion as it grows from youth to manhood. Already events of great public importance have transpired, and been duly chronicled in the Calendar before us. While we write events of equal importance, and of great public significance, are transpiring; it will be convenient for our public men to have before them a "ready reckoner," which gives day and year for every such event, without the necessity for a search being made in the cumbrous journals of the House and other public records.

Besides containing the Calendar, the little book before us is replete with information. In it we find the official title of the Governor General, and a short historical sketch of his life and public services. Next his Staff, and then the members of the Queen's Privy Council. The part of the book which contains the Directory, is very complete. The name and residence in Ottawa of each member of the Senate and House of Commons are given in alphabetical order, together with a statement shewing the names of the House of Commons candidates for the several constituencies at the last general election, and at each election since held, with the number of votes polled for each candidate, and the population of each constituency in the Dominion. Next there is an alphabetical list of the members of the Dominion Parliament, and of the four Local Legislatures, shewing their constituencies, and particularizing those who have been appointed or elected since the general election of 1867. Following this is a Directory to the Public Departments, shewing where they are to be found, and the names of the officers in each of them Then we have the names of the members of the Local Governments, and the names of the officers in the several departments of each of the Provinces of the Dominion.

We call attention to the advertisement of an enterprising florist, whose "*Floral Guide*" speaks for itself.

The best recreation for a man wearied with the toils of court or an office is an hour's "labour of love" in a garden either before or after business hours. We therefore make no apology in speaking at this season of the year of something which, though not of professional interest, has been the solace and pleasure of many whose names are eminent in the legal world.

## APPOINTMENTS TO OFFICE.

### STIPENDIARY MAGISTRATE AND REGISTRAR.

JESSE WRIGHT ROSE, of Prince Albert, Esq., to be Stipendiary Magistrate and Registrar of Deeds in and for the Territorial District of Parry Sound. (Gazetted March 26th, 1870.)

### NOTARIES PUBLIC.

RUPERT MEARSE WELLS, of the City of Toronto, Esq., Barrister-at-Law. (Gazetted Feb. 12, 1870.)

GEORGE YOUNG SMITH, of the Town of Whitby, Esq., Barrister-at-Law. (Gazetted March 5th, 1870.)

HENRY CARSCALLEN, of the City of Hamilton, Gentleman, Attorney-at-Law. (Gazetted March 19th, 1870.)

JOSEPH JACQUES, of the City of Toronto, Attorney-at-Law; and THOMAS CHAS. PATTESON, of the City of Toronto, Attorney-at-Law. (Gazetted March 26, 1870.)

ARTHUR J. MATHESON, of the Town of Perth, Esq., Barrister-at-Law; P. McVEAN CAMPBELL, of the Town of Chatham, Esq., Barrister-at-Law; ALFRED FROST, of the Town of Owen Sound, Gentleman, Attorney-at-Law. (Gazetted April 2nd, 1870.)

### ASSOCIATE CORONERS.

DAVID P. BOGART, of Carleton Place, Esq., M.D., to be an Associate Coroner within and for the County of Lanark. (Gazetted Feb. 19th, 1870.]

PETER McLAREN, of the Town of Paisley, Esq. MD., to be an Associate Coroner within and for the County of Bruce. (Gazetted March 12th, 1870.)

THOMAS W. POOLE, of the Town of Lindsay, Esq., M.D., to be an Associate Coroner within and for the County of Victoria. (Gazetted March 19th, 1870.

JAMES P. LYNN, of the Village of Renfrew, Esquire, M. D., to be an Associote Coroner within and for the County of Renfrew. (Gazetted April 9th, 1870.)

ALCIDE J. B. DELAHAYE, of the Gore of Toronto, Esq., M.D., to be an Associate Coroner within and for the County of Peel. (Gazetted April 9th, 1870.)

DAVID BONNAR, of Albion, Esq., M.D., to be an Associate Coroner within and for the County of Peel. (Gazetted April 16th, 1870.)

JOHN ALBERT, of the Village of Meaford, Esq., to be an Associate Coroner within and for the County of Grey. (Gazetted April 23rd, 1870.)

### SHERIFF.

ABSALOM GREELY, of the Town of Picton, Esq., to be Sheriff of and for the County of Prince Edward, in the room and stead of HENRY I THORP, Esq., deceased. (Gazetted March 26th, 1870 )

### COUNTY CROWN ATTORNEY AND CLERK OF THE PEACE.

HENRY H. LOUCKS, of the Town of Pembroke, Esq., Barrister-at-Law, to be Connty Crown Attorney and Clerk of the Peace in aud for the County of Renfrew, in the room and stead of William Duck, Esq., deceased. (Gazetted March 26th, 1870.

## DIARY FOR JUNE.

| | | |
|---|---|---|
| 1. | Wed. | New Trial Day, Common Pleas. |
| 3. | Frid. | New Trial Day, Queen's Bench. |
| 4. | Sat.. | Easter Term ends. |
| 5. | SUN. | *Whit Sunday.* |
| 6. | Mon. | Last day for notice of trial for County Court. |
| 11. | Sat.. | *St. Barnobas.* Last day for service for County Court, York. |
| 12. | SUN. | *Trinity Sunday.* |
| 14. | Tues. | General Sessions and County Court Sittings in each County except York. Last day for Court of Revision finally to revise assessment rolls. |
| 19. | SUN. | *1st Sunday after Trinity.* |
| 20. | Mon. | Accession of Queen Victoria, 1837. |
| 21. | Tues. | Longest Day. |
| 22. | Wed. | Declare for County Court York. |
| 24. | Frid. | *St. John Baptist.* |
| 26. | SUN. | *2nd Sunday after Trinity.* |
| 29. | Wed. | *St. Peter.* |
| 30. | Thur. | Half-yearly School returns to be made. Replications County Court York to be filed. Deputy Registrar in Chancery to make return and pay over fees. |

THE

# Canada Law Journal.

JUNE, 1870.

## LEX LOCI CONTRACTUS—LEX FORI.

By D. Girouard, Esq., *Advocate, Montreal.*

(*Continued from page* 118.)

The law of prescription in force in Lower Canada being borrowed from the English one, it ought to be governed by the same rules in case of conflict of prescription, viz., by the *lex fori*; and such was the opinion of the *Codificateurs* (3rd report, *Title Prescription*, Art. 8), and their opinion is moreover in accordance with our jurisprudence.

In the case of *Côté* v. *Morison*, 2 *L. C. Jurist*, p. 206, a note made in Mackinaw, State of Michigan, was declared to be subject to our quinquennial prescription (12 Vic. chap. 22), by the Superior Court of Montreal, and in Appeal that judgment was confirmed on other grounds, the Court remaining silent on the question of prescription.

In the case of *Fenn* v. *Bowker*, 10 L. C. J. p. 121, the Court of Appeals maintained a plea of prescription of five years in an action on a promissory note made at Rochester, State of New York.

In the case of *Adams* v. *Worden*, 6 L. C. Rep. p. 237, an action was brought upon a promissory note made at Plattsburg, New York. The defendant pleaded the Statute of Limitations of the State of New York. To this plaintiff demurred: 1. Because the defendant cannot set up any foreign law or statute of Limitations; 2. Because in Lower Canada there is no such law of prescription as is alleged in the exception. On the 15th December, 1852, judgment was rendered by the Superior Court at Montreal, composed of Day, Smith and Mondelet, J.J., dismissing the said plea of limitation, on the ground "that the laws of the State of New York whereby the pretended limitation is created, have no force or operation in this Province." In appeal the Court held this judgment premature, because the statute of the State of New York had not been proved.

In all the above cases, no place of payment was specified, but the above decisions do not the less conclusively lay down the principle that prescription is governed by the *lex fori* and not by the *lex loci contractus.*

What could have been the cause of the conversion of Chief Justice Mondelet from the opinion he held in *Adams* v. *Worden?* In his decision in *Wilson* v. *Demers*, the learned judge does not even notice his judgment in the former cause.

Finally with regard to Lower Canada, the decision of Mr. Justice Mondelet was overruled in Review, by Messrs. Justices Mackay and Torrance, at Montreal, on the 30th of November, 1868: "Volumes, said Mr. Justice Mackay for the Court, have been written on the domicile of the debtor, as affecting the remedy or the suit; about his domicile, at the time of the contract, at the time of the suit; on the place of the contract, the place for payment, &c. The Bar is familiar with the reasonings *pro.* and *con.* As many authors are on one side as on the other. The old ones were divided, and so are the new. *Pothier* has been attacked for his opinions by *Troplong*, and lastly *Troplong* by *Marcadé.* A refuge can be found only in the old general rule, that the *lex fori* must prevail in cases of personal action such as the present one."

It must, however, in justice, be added that the said judgment has been appealed from, and is now pending before the Court of Queen's Bench, the highest Court in the Province.

In Louisiana, another French colony, which like Canada, has been transferred to a nation governed by the common law of England, and which, like Lower Canada, has adopted many of the commercial laws of Great Britain, it is not surprising to find the English principle of the *lex fori* fully adopted: *Union Cotton Manufactory* v. *Lobdell*, 9 Martin, 435 (1828), Matthews, J.; *Erwin* v. *Lowry*, 2, An. Louis, R. 314 (1847), Slidell, J.; *Newman* v. *Goza*, 2 *ib.*, 643 (1847), Slidell, J., *Lacoste* v. *Benton*, 3 *id.*, 220 (1848), Slidell, J.; *Brown* v. *Stone*, 4 *id.*, 235 (1849), Rost, J.; *Bacon* v. *Dahlgreen* (1852), 7 An. Louis, Rep. 599, Eustis, C. J.; *Succession Lucas*, (1856), 11 *id.* 296, *per* Spofford, J.; *Walworth* v. *Routh* (1859), 14 *id.* 205, *per* Merrick, C. J. Mr. Justice Slidell remarked in *Lacoste* v. *Benton:* "There is a general principle which has been so frequently recognized by the Courts of this State as to be now beyond dispute. It is that prescription is a question affecting the remedy, and is controlled by the *lex fori.* The rule is not peculiar however to our Courts, but has become a universal one in international jurisprudence."

It seems clear that in no British colony can a different conclusion be arrived at, supposing the English jurisprudence to be decisive in favor of the *lex fori.* This question, in effect, bears upon the relations of foreigners with British subjects, and consequently is a question of public law, to be decided by the rules of the English jurisprudence. And so the Privy Council held, in 1852, in the case *Ruckmaboye* v. *Mottichund*, 8 Moore, Privy Council Rep., p. 4, on appeal from a decision of the Superior Court of India, which had fully applied the English rule to that colony. Per Sir John Jervis: "The arguments in support of the plea are founded upon the legal character of a law of limitation or prescription, and it is insisted, and the committee are of opinion, correctly insisted, that such legal character of the law of prescription has been so much considered and discussed among writers upon jurisprudence, and has been so often the subject of legal decision in the Courts of law of this and other countries, that it is no longer subject to doubt and uncertainty. In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *lex fori.*"

The courts of the Province of Ontario also have adopted the doctrine of the *lex fori:* 2 Q. B. U. C. Rep. 265; *Darling* v. *Hitchcock*, referred to in 10 L. C. Jurist, p. 268, but since reversed by the Court of Appeals at Toronto. In the latter cause, a note made in Ontario, payable in Montreal, was prescribed by the law of Quebec, but not by the law of Ontario, and the defendant pleaded the Lower Canada prescription. The question principally was, whether a Court of Justice in Ontario was bound to enforce the Promissory Note Act (12 Vict. chap. 22) enacted by a legislature common to both Provinces, and declaring that all notes "due and payable in Lower Canada" should be considered as absolutely paid, unless sued on within five years from maturity. But as the note was made payable in Montreal generally, without the words "only, not otherwise and elsewhere," as required by the laws of Ontario, the same was considered as not payable in Lower Canada, and judgment did go for the plaintiff. Chief Justice Draper, however, on delivering the judgment of the court, fully recognized the soundness of the *lex fori.* He said: "I take it to be equally true as a general proposition that a plaintiff has the full period prescribed by such local law (the law where the action is brought), for bringing his suit before it would be so barred." He then quotes Story, *De la Vega* v. *Vianna*, *British Linen Co.* v. *Drummond*, and *Hubert* v. *Steiner.*

What we have said would seem to be sufficient to show that in England, the rule of the *lex fori* is well established. It is, however contended, upon the authority of Westlake, *Private International Law*, § 250 *et seq.*, and Bateman, *Commercial Law*, § 143 *et seq.*, that the English decisions rest, 1. upon the authority of Story, *Conflict of Laws*, and 2. on fallacies.

The case of the *British Linen Company* v. *Drummond*, decided on the 22nd May, 1830, has been often cited as a leading one bearing upon the question in controversy, and the principle therein laid down has been followed in many cases anterior to the publication of Story, Conflict of Laws, as the *De La Vega* v. *Vianna*, 1 B. & Ad. 284, 1830; *Trimbey* v. *Vignier*, 1 Bing. N. C. 151, 1834; and *Hubert* v. *Steiner*, 2 Bing. N. C. 203, 1835; and it had been also admitted long previous to these cases, particularly in *Williams* v. *Jones*, 13 East. 439, 1811, and other cases cited in *Lippmann* v. *Don*, decided in the House of Lords on the 26th May, 1837, 2 S. & M. 682: and although in this instance, Lord Brougham mentions the name of Story in conjunction with the names of Huber and Paul Voet, we will soon have occasion to shew that the doctrine laid down by his Lordship rested, not upon fallacies or upon the *dictum* of Story, but upon the soundest reasoning, Suffice it to say at present, that, notwithstanding the objections of Westlake and Bateman, the decision in *Lippmann* v. *Don* has been recognizen as an authority in both Great Britain and the United States, and is taken, along with the other precedents, as fixing the law of those countries, as the following array of authorities will show :

13 Peters, 327 ; 2 B. & Ad. 413 ; 1 id. 284 ; 10 B. & Cresw. 903 ; 3 Burge's Com. on Col. and For. Laws, 883 ; 4 Cowen. 528, note 10 ; Id. 580 ; I Gall 371 ; 2 Mason, 151 ; 6 Wend, 475 : I Green's N. J Rep. 68 ; 3 Peters, 270, 277 ; 5 id. 466 ; 8 id. 361 ? 13 id. 312 ; 18 id. 378 ; 13 Serg. & R. 395 ; 2 Rand. 303 ; 3 J. J. Marsh, 600 ; 3 Vern, 150 ; 3 Gilman, 637 ; 1 Meigs, 34 ; 7 Missouri, 241 ; 9 How, U. S. 407 ; 7 Maine, 337, 470 ; 36 Maine, 362 ; 1 Penn. State R. 381 ; 2 Mass. 84 ; 13 id. 5 ; 17 id. 55 ; 3 Conn. 472 ; 2 Bibb. 207 ; 2 Bailey, 217 ; 1 Hill, S. C. 439 ; 2 Dall. 217 ; 1 Yeates, 329 ; 1 Caines, 402 ; 1 Johns, 139 ; 3 id. 190 ; 3 id 263 ; 11 id. 168 ; 4 Conn. 49 ; 2 Paine, C. C. 437 ; 2 S. & M. 682 ; 1 Ross' Leading Cases, 559-605 ; Angell on Limitations (ed. 1869), p. 52-64, No 64-68 ; Parsons on Bills, p. 381-391 (ed. 1867) ; Phillimore on International Law, vol 4, p. 573 ; Dickson on Evidence, pp. 532-537 ; Tait on Evidence, 3rd ed. pp. 460-465 ; Henry on Foreign Law, appendix, p. 237 ; 5 Johnson, N. Y., 152 ; 10 B. & C. 816 ; 1 Smith, Leading Cases (ed. 1866), p. 954, N. 786 ; Story, Conflict of Laws, § 576, p. 766 and *seq* (ed. 1865) ; Wheaton, International Law, p. 187 ; 1 Bing. N. C. 111 ; 2 id. 202 ; 3 Conn. 54 ; 1 Wis. 131 ; 10 Pick. 49 ; 11 id. 36 ; 6 Cush. 238 ; 13 East, 439 ; 2 Q. B. Rep. U. C. 265 ; 9 Martin's Rep. 435 ; 2 an. Louis. Rep. 315 ; id. 646 ; 3 id. 221 ; 4 id. 235 ; The English Jurist, 1851 to 1855, p. 122 ; *Ruckmaboye* v. *Mottichund* (1852), 8 Moore, Privy Council, p. 4,

That the *lex fori* is still the English rule is evident from the following authorities.

In the second edition of his Leading Cases on Commercial Law (1868), Mr. Tudor in reviewing the English jurisprudence on the matter, says (280): "The limitation of actions clearly does not belong to, and will not be determined by, the law of the country where the contract was entered into, but by the law of the country where proceedings are taken to enforce."

Mr. Forsyth in his Opinions on Constitutional Law, just published in London (1869), also remarks, (p. 249) : "The *lex fori* applies to all modes of enforcing rights, and governs as to the nature, extent and character of the remedy, including statutes of limitation."

In the case of *Harris* v. *Quine*, L. R. 4 Q. B. 653, decided in the Court of Queen's Bench, 7th June, 1869, by Cockburn, C.J., and Blackburn and Lush, JJ., the authority of *Huber* v. *Stayner*, and other cases above cited were fully sustained. It must be admitted that the Chief Justice felt inclined to adopt the *lex loci contractus*, but he would not undertake to derrogate from the well settled jurisprudence of England. "If the matter," he said, "were *res integra* and I had to form an opinion unfettered by authority, I should be much inclined to hold, when by the law of the place of contract, an action on contract must be brought within a limited time, that the contract ought to be interpreted to mean: 'I will pay on a given day or within such time as the law of the place can force me to pay.'" His decision was, however, was in the following terms: "On the question as to whether the judgment on the plea in the Manx Court is a bar to bringing an action in the courts of this country. I think we are bound by authority that it is not, *Huber* v. *Stayner*, and other cases, having decided that such a statute of limitations, as the present simply applies to matters of procedure, &c., not to the substance of the contract."

The Judges Blackburn and Lush, while concurring in the decision of the Chief Justice, expressed no opinion as to the soundness of the rule of the *lex fori*, but merely admitted the same to be the law of England.

In Scotland, however, the *lex fori* does not appear to be well established, and, there, another system, which has not yet been noticed anywhere else, was in former times strongly supported. Mr. Guthrie, in his late translation of Savigny, Conflict of Laws, (1869), Note B., p. 219, says :—

"The Scottish Courts, since the middle of last century, decidedly preferred the prescription of the debtor's domicile . . . But they looked not to the debtor's domicile at the time of the action, but rather to the debtor's domicile *during the whole currency of the term of limitation.*"

Mr. Guthrie, who quotes several Scottish decisions previous to *Lippmann* v. *Don*, as supporting this view, is of opinion that it is the *real Scottish rule*, but concludes his remarks by stating that "the case of *Lippmann* v. *Dòn*, renders it imperative to apply the *lex fori*, without respect to the domicile of the debtor, except in so far as this may fix the place where the action is brought." And so the Courts there held since. See cases cited by Guthrie, p. 220, and decided in 1839, 1848 and 1854.

It may here be observed that Bateman, who wrote in 1860, on the Commercial Law of the United States, is not even noticed in *Power* v. *Hathaway*, decided 5th December, 1864, by the Supreme Court of the State of New York, and reported in Barbour, vol. 48, p. 217. By the Court, Smith, J.: "It is a settled principle of international law that all suits must be brought within the period prescribed by the local laws of the country where they are brought. The *lex fori* governs all questions arising under the Statutes of Limitations of the various States of this country."

Merlin, Marcadé and Bar merged the rule of the *lex fori* in that of the *lex domicilii debitoris*, because the domicile of the debtor being the place where, by the common law, the action is brought, the two rules are really the same in their result. This, however, although true in most instances, is not so in the case where a foreigner, for instance, transiently in Lower Canada, or against whom jurisdiction is found by the possession of property therein, is sued in that country. As remarked by Mr. Guthrie, since the decision in *Lippmann* v. *Don*, the judgment would, in Scotland, be the same as if the defendant were domiciled within the jurisdiction of the Court. There is thus always regard to the forum, not to the debtor's natural and permanent forum, but to the forum in which the action is instituted. There is, however, no doubt that the French jurists who maintain the rule of the *lex domicilii debitoris*, meant in reality the *lex fori*, inasmuch as by the common law of France, no action can be brought only before *le juge du domicile du débiteur*, and that a foreigner cannot implead another foreigner before the French tribunals, unless there has been abroad some decree or judgment of a court declaratory of the right of the claimant. The Cabinet Lawyer for 1864, p. 411; 1 N. Pigeau, p. 150.

(*To be continued.*)

## STAMPS ON BILLS AND NOTES.

As the law regulating Stamps on Bills and Notes is governed by several statutes which affect distinct periods of time, we think it will not be amiss, and may save time to some of our readers, to give a general epitome of the statute law of the Province bearing upon the subject.

The matter may be divided into four heads or periods; 1st. The period before legislation on the subject; 2nd, Under the Statutes of 1864, 27 & 28 Vic. cap. 4; 3rd, Under the Act amending the last Act, viz.: 29 Vic. cap. 4; and lastly, under the Act at present in force, 31 Vic. cap. 9.

1st. With reference to the period before the first of August, 1864, we need only say, that any Bill, Draft or Note, accepted, drawn or made before that date required no stamp to be affixed to it, or duty levied on it.

2nd. The Statute of 27 & 28 Vic. cap. 4, required that duty should be paid on all promissory notes, drafts or bills of exchange for $100 or upwards (this act does not affect notes, drafts or bills, under that amount), and it provides that the duty shall be levied and collected as follows:

On each note, draft or bill, executed singly, a duty of three cents for the first $100, and a further duty of three cents for each additional $100 or fraction of $100:

When a draft or bill of exchange is executed in duplicate, a duty of two cents on each part for the first $100, and a further duty of two cents on each part for each additional $100 or fraction:

When such draft or bill is executed in more than two parts, the duty shall be one cent on each part, in the same manner and ratio as when drawn in two parts:

The duty shall be paid by affixing an adhesive stamp:

The stamps shall be obliterated by the signature or initials of the maker or drawer, or some integral or material part of the instrument written upon the stamps:

The stamps shall be affixed by the maker or drawer when the instrument is made or drawn in this Province, and by the acceptor or first indorser within the Province where the instrument is made or drawn without the Province:

In case the duty has not been paid as before mentioned, any subsequent party to such instrument, or person paying the same, may render the same valid by affixing stamps to double the amount of duty required, and writing his signature or initials on the stamp or stamps so affixed.

This Act governs the period of time from 1st of August 1864 to 1st of January 1866.

3rd. The Act 29 Vic. cap. 4 amends the last Act. It makes a duty payable on all notes, drafts and bills, even if less than $100, as follows: if the note, draft, or bill does not exceed $25, that is, for $25 and under, a duty of one cent is imposed, when over $25 and not exceeding $50 a duty of two cents, and a duty of three cents if over $50 and less than $100. This portion of the amending Act came in force on the 1st of January, A.D. 1866, and continued to regulate payment of duty on notes drafts, and bills, under $100 until the first day of February, A.D. 1868.

29 Vic. cap. 4 also amends 27 & 28 Vic. cap. 4, by providing that it shall not be necessary to obliterate any stamp by writing the signature or initials upon it, but that the person affixing such stamp shall, at the time of affixing, write or stamp thereon the date when it was affixed. This last amendment regulates obliteration of stamps, from 1st October, 1865, to 1st February, 1868.

4th. We now come to the Act regulating the law as it now is, and has been since the first day of February, A.D. 1868. We would premise, first, that this Act does not affect notes, drafts, or bills under $25, and, that as regards such notes, drafts and bills, no duty is now payable. The duties payable by this Act are, for notes, drafts, or bills which *amount to* but *do not exceed* $25, a duty of one cent; over $25 but not exceeding $50, two cents; over $50 but not exceeding $100, three cents; when drafts or bills are executed in more than one part, the duty is payable in the same ratio as provided by the Act of 1864, 27 & 28 Vic. cap. 4, before set out. The duty shall be paid by stamps, which are to be obliterated by signature, initials, or some material or integral part of the instrument written thereon, in the same way as mentioned in reference to the Act of 1864, or they may be obliterated by writing or stamping thereon the date of affixal?

It is necessary under all the statutes referred to, when any interest is made payable at the maturity of the bill, draft, or note, that it should be added to the principal amount when calculating the amount on which duty is to be paid.

We might draw attention to the great necessity there is for seeing that the stamps are properly cancelled. A case lately argued in the Court of Queen's Bench (*Young* v. *Waggoner*, 29 U. C. Q. B. 87) decides that even if there are sufficient stamps on the note, draft, or bill, still if they are not *all* cancelled they might as well not be on the note, so that it would be well where one stamp is placed over another, as is often done, (though we think it a bad practice), to see that the under one is cancelled.

Another point to be observed is, that if a note, draft, or bill comes into a holders hands insufficiently or improperly stamped, the double duty must be paid by affixing the stamps at once, as otherwise it is of no avail: *McCalla* v. *Robinson et al.*, 19 U. C. C. P. 118.

Such defences as want of stamps, or improper cancellation and the like come under the head of statutory defences, and in Division Courts where the defendant wishes to get the benefit of the statutory Act, he must serve the necessary notice that he intends to take such objection at the trial, otherwise he will be unable to avail himself of his defence.

## ATTORNEY'S COSTS.

A Bill has been introduced into the British House of Commons, for amending the law relating to the remuneration of attorneys and solicitors, which, if passed, will effect a radical change in the present system. We have not heard what has been the result of the proposed measure, but it is worthy of passing notice even if it has not become law.

It is proposed by the Bill to give attorneys and solicitors increased rights in contracting with their clients, both with respect to costs and to their liability for negligence. It is an approach to the system, almost universal, we believe, in the United States, where the attorney agrees for a certain sum of money to conduct a suit to termination, or to perform some other business of a professional nature, and where a tariff of fees is unknown, though there the fees come out of the plaintiff.

It is provided that such sum as may be agreed upon between the attorney and his client, shall not be liable to taxation, except in some peculiar cases referred to in the Act; and there are other provisions as to deduction being made from the sum in case the agreement has not been completed or performed by the attorney, either in consequence of his death or otherwise; but it is not proposed to effect in any way the present system as to the recovery of costs from, or payable to the client by any other person. An attorney may take security from his client for his future fees, charges, and disbursements to be ascertained by taxation or otherwise. In determining the amount of remuneration to an attorney for his service, the taxing officer is to have regard not only to the length of documents prepared, or the time occupied, but also to the skill, labour, and responsibility involved.

Speaking of the Act, the *Solicitor's Journal* remarks with much truth, "that the present system affords a temptation to multiply technicalities, simply because much real work is remunerated on quite an inadequate scale."

If this remuneration is inadequate in England, how much the more here, especially when our tariff was made years ago, when the expense of living was half what it is now.

The following gentlemen were, during last term, admitted to practice as attorneys, in addition to those whose names we mentioned last month, viz.:

Messrs. Frederick C. Martin, Toronto; Fred. W. Johnston, Toronto; and A. S. Wink, Dundas.

A Bill has been introduced into the English Parliament "with respect to the revesting of Mortgaged Estates in Mortgagors," which proposes to do by a statutory form of receipt what we have for many years done by means of the certificate of discharge under our Registry Acts.

## SELECTIONS.

## RIGHT OF LANDLORD TO REGAIN POSSESSION BY FORCE.

(*Continued from page* 124.)

It is apparent therefore, as the clear result of English authority, that an entry by force by the landlord, or his forcible expulsion of the tenant, are illegal only to the extent of the penalties expressly annexed to the act by the statute, and no further, and that no color of authority exists for holding the possession so gained generally unlawful, or for founding thereon any common-law action by inference from the statutory prohibition. Still less can the special *qui tam* action of trespass be transmuted into a general action of trespass. The precise form is given by Fitzherbert, (2 Nat. Brev. 248 F.) and is founded only on the statute. In *Davison* v. *Wilson*, *supra*, the attempt was made to bring the action of trespass *qu. cl.* under the statute, by adding to the declaration in trespass in common form, that the entry and expulsion were "with the strong hand and against the form of the statute;" but even these words were held insufficient. It has moreover been uniformly held that the statutory action can only be maintained by one who has a freehold, the action only being given on disseisin; *Rex* v. *Domry*, 1 Ld. Ray. 610; *Cole* v. *Eagle*, 8 B. & C. 409; and does not lie against one who has a freehold and right of immediate entry; Year Book 9 Hen. VIII. fo. 19, pl. 12; 15 Hen. VII. fo. 17, A, pl. 12. And it need hardly be added that the restitution directed by the statutes of 8 Hen. VI. c. 9, s. 3; 21 Jac. I. c. 15, to freeholders and tenants for years, can only be made when and to those to whom it is directed by those statutes, and cannot be waived and replaced by an action of trespass. The restitution moreover is the fruit of a criminal proceeding.

The American cases therefore, which have based an action of trespass, whether *qu. cl. fregit*, for assault, or *de bonis asportatis*, on the supposed authority of the English law, wholly fail of support; and can only be sustained, if at all, on some distinct authority given by the terms of their local statutes. It will suffice if, instead of specially reviewing these enactments, we examine such authorizing clauses, when relied on by the courts to sustain the action in question. Except so far as qualified by such enactments, the doctrine that possession obtained by force is a lawful one, seems as clear on principle as we have seen it to be on authority. The tenant who, after his own possessory right is determined, seeks to hold his lessor as a trespasser for entering upon him with force, must in establishing his own possessory title disclose its defective character as against the title relied on by the lessor in entering; for the common law action of trespass is an assertion of the plaintiff's individual possessory right, and not an action for a public wrong; whereas, as against a stranger, mere possession being sufficient, no title subordinate to the defendant's is in any way disclosed in the action. And this was the ground generally taken by the American courts, when the point actually arose for decision, and an action of trespass was with great unanimity of authority held not to lie. Thus in Pennyslvania, *Overdeer* v. *Lewis*, 1 W. & S. 90; South Carolina, *Johnson* v. *Hannahan*, 1 Strob. 313; Kentucky, *Tribble* v. *Frame*, 7 J. J. Marsh. 599; North Carolina, *Walton* v. *File*, 1 Dev. & B. 567; and in New York in repeated decisons: *Wilde* v. *Cantillon*, 1 Johns. Cas. 123; *Hyatt* v. *Wood*, 4 Johns. 150; *Ives* v. *Ives*, 13 Johns. 235; *Jackson* v. *Morse*, 16 Johns. 197; justifying the emphatic language of Nelson, C. J., in *Jackson* v. *Farmer*, 9 Wend. 201: "Statutes of Forcible Entry and Detainer punish criminally the force, and in some cases make restitution, but so far as civil remedy goes there is none whatever." And these earlier cases have been reaffirmed by recent adjudications: *Livingstone* v. *Tanner*, 14 N. Y. 646; *People* v. *Field*, 52 Barb. 198, 211. So in Vermont, in *Beecher* v. *Parmele*, 9 Vt. 352, Redfield, J., says, "it is now well settled that an intruder, in quiet possession of land, may be forcibly expelled by the owner, so far as the land is concerned. If the owner is guilty of a breach of the peace and trespass on the person of the intruder, he is liable for that, *but his possession is lawful;*" and actions of trespass were accordingly held not to lie in *Yale* v. *Seely*, 15 Vt. 221; *Hodgeden* v. *Hubbard*, 18 Vt. 504.

In a few States some cases have lately departed from this rule and held trespass *qu cl.* maintainable; but they will be found to rest almost without exception, on the supposed authority of the English law as set forth in the long since exploded cases of *Newton* v. *Harland* and *Hillary* v. *Gay;* though, as will be remembered, no such action was countenanced even by these decisions, and their authority for trespass for assault has, as we have seen, been wholly overruled. *Moore* v. *Boyd*, 24 Maine, 242, and *Brock* v. *Berry*, 31 Maine, 293, frequently but erroneously cited as sustaining this action, do not apply, for in both the tenancy was at will, and the tenant's possessory right had not terminated, and in the latter case, had the tenant been at sufferance, as he was mistakenly called by the counsel, the facts presented exactly the case of *Meader* v. *Stone*, 7 Met. 147; *Mugford* v. *Richardson*, 6 Allen, 76; *Argent* v. *Durrant*, 8 T. Q. 403, where no action was held to lie. In *Larkin* v. *Avery*, 23 Conn. 304, the landlord, having a right of re-entry, entered in the tenant's absence and resisted with force his attempt to repossess himself of the premises, and was held liable in trespass for assault. A clearer case could hardly be put of the landlord's right to use force, as a legal possession had been gained, and force was only employed to defend it; and this point has so been held wherever the case has arisen elsewhere; *Todd* v. *Jackson*, 2 Dutch 525; *Mussey* v. *Scott*, 32 Vt. 82; *Davis* v. *Burrell*, 10 C. B. 821. *Hilbourne* v. *Fogg*, 99 Mass. 11; even by courts which have denied the right of forcible re-entry. The court distinguish the case before them from trespass *qu. cl.*, and seem to think that trespass for assault is supported by the Massachusetts law in *Sampson* v. *Henry*, 11 Pick. 379, being misled by Judge Wilde's *dictum* above cited, that being a case of excessive force, but mainly rely on the exploded doctrine of *Newton* v. *Harland*, which they conceived to be the English law.

In *Dustry* v. *Cowdrey*, 23 Vt. 631, the court which had repeatedly enunciated a different doctrine,* altered their opinion, moved thereto, we presume, by the then recent decisions of *Newton* v. *Harland* and *Hillary* v. *Gay*, and sustained an action of trespass *qu. cl.* As this decision was a very elaborate effort to support this action, including all the grounds which have been urged in its support, and has since been followed as a leading case by the court of another State, it claims a more extended examination. The facts simply were, that the plaintiff, a tenant at will, had agreed at the inception of his tenancy to "leave at a certain day, and that if he did not the defendants might put him out in any way they chose." The day fixed for his quitting passed, and on his refusal then to go the defendants entered peaceably and dismantled the premises, and after a further refusal on his part to go, removed him and his family, but gently and with no more than necessary force. It would seem as if the agreement on the tenant's part for his ejection was an ample warrant for his removal with due and proper force. This point has been expressly so held in England, and in all the American courts where it has arisen, and such removal has been held justifiable under a plea of leave and license and no breach of the statute: *Feltham* v. *Cartwright*, 7 Scott, 695; *Kavanagh* v. *Gudge*, 7 M. & G. 316; *Fifty Assoc.* v. *Howland*, 5 Cush. 214; *Page* v. *Dvpey*, 40 Ill. 506. But the point was neither taken by counsel nor noticed by the court. Having overlooked a ground decisive of the case in favour of the defendant, the court then proceed to pronounce judgment for the plaintiffs, placing their decision mainly on the ground, supposed to be conclusively established by *Newton* v. *Harland* and *Hillary* v. *Gay*, that a legal possession could not be gained by a prohibited act. After a full statement of these two cases, they say, p. 644, "This is the latest declaration of the courts of Westminster Hall upon this subject. . . . . We have no disposition to add any thing in regard to the true construction of law as derived from the decisions of the courts of Westminster Hall, and we think the decisions of

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* *Beecher* v. *Parmele*, 9 Vt. 352, and other cases, *supra*.

English courts as to the common law or the construction of ancient statutes are to be regarded of paramount authority." We fully agreee with the court in this conclusion, and since both the latest and uniform doctrine of the English courts is, as we have shown, the reverse of that enunciated by the court in this case, we do not doubt that it will be as readily adopted by them; especially as their conclusion in this case meets little more support from American than from English authority. The court rely on the cases of *Moore* v. *Boyd*, and *Brock* v. *Berry*, which, we have shown, do not apply; and cite the *dictum* of Wilde, J., from *Sampson* v. *Henry*, 11 Pick. 379, but do not refer to the decision in the same case, 13 Pick. 36, that trespass *qu. cl.* would not lie, nor to the express adjudication by the same learned judge in *Miner* v. *Stevens*, 1 Cush. 485, that the lessor might regain possession by force without liability to an action by the lessee, and his unqualified assent to the New York and English law accordingly.

One further ground is dwelt on at length by the court, in support of the action of trespass; that, as the statute of Vermont had re-enacted the English statute, 8 Hen. VI. c. 9, which gave restitution and a *qui tam* action with treble damages to the ousted party, he might waive these rights and bring trespass *qu. cl.* instead. The court, in assimilating their statute to that of 8 Hen. VI. do not seem aware that by the latter restitution and the *qui tam* action were given only to freeholders, *Cole* v. *Eagle*, *supra*; 1 Hawkins Pl. A. B. I., c. 28, sec 15. The same limitation was put on the New York statute by the court of that State; *Willard* v. *Warren*, 17 Wend. 257, 261: hardly, therefore, furnishing a precedent for the assertion of these rights by a tenant at sufferance. But had such rights been expressly given to such a tenant by the Vermont statute, it is a novel doctrine that special proceedings in a statute can be waived at will by the party who may be entitled to their benefit, and in lieu thereof an action be maintained which did not lie at common law and was not given by the statute. So far as the restitution is concerned, it is much the same as if in Massachusetts the executors of a person, killed by the negligence of a common carrier, should waive the indictment given by Gen. Stat. c. 180, sec 34, and claim to recover in tort, because they would have been entitled to the fine imposed upon a conviction. "The form," the court remark, "is immaterial." An extremely convenient but somewhat perilous doctrine. And it should further be observed that, while these statutory rights are expressly limited by the Vermont enactment to the party who has successfully maintained his complaint, the doctrine of the court would allow him in return for giving up rights which he had not shown he was entitled to, to bring an action neither conferred by the statute nor maintainable without it.

In arriving at this conclusion, the court had to surmount another difficulty, namely, that not merely must the plaintiff under the English statute show a freehold, but if the defendant justifies his entry by title, the *qui tam* action fails. This restriction on the maintenance of the action, the court seem to consider to have arisen from "a blunder, to call it by no severer name," between the statute 5 Rich. II. which did not, and the statute 8 Hen. VI. c. 9, which did give this action. But Fitzherbert, 2 Nat. Brev 248 H. says, "If a man enters with force into lands and tenements to which he hath title and right of entry, and put the tenant of the freehold out, now he who is so put out shall not maintain an action of forcible entry against him that hath title and right of entry because that that entry is not any disseisin of him." To this a note, said to be by Lord Hale, is appended; viz., "He shall not maintain it on the stat. Rich. II.; sec. 9 Hen. VI. fo. 19, pl. 12, but the party shall make fine to the king for his forcible entry." The meaning of Lord Hale doubtless was, that the action was no more maintainable on the statute of Richard than it was declared to be by Fitzherbert on the statute of Henry, on which this author was expressly commenting. This is clear from the case which is cited by Lord Hale from the Year Books, decided the year after the passage of the statute of Henry, which held expressly, that if the entry of the defendant was with title, no action lay: "but for the force the party entering shall make fine to the king." The decision is exactly given in Lord Hale's note; it runs, "On n'aura action quand il est ouste ove fortmain par un autre, ou entre fuit congeable [justifiable]; per ceo quod pur le fortmain le party convict fera fine au Roy. . . Et purceo quod le breve reherce le statut . . et pur ceo qu'il ne dit ubi ingressus non datur per legem, le breve a batist; car si le entre fuit congealable sur le plaintiff, il n'ad cause d'action:" The careful reader will be somewhat surprised to find that Lord Hale's note is quoted by the court: "He shall not maintain it by the statute Rich. II. *but may by the statute of* Henry VI.," thus converting a decision from the Year Book, expressly denying the action, into a statute authorising it, by the deliberate insertion of the words italicized, not one of which is to be found in the author cited. In any tribunal less respectable than the court of Vermont, this might be called by even a "severer name" than "blundering." It may be added, that the law laid down in the case from the 9 Hen. VI. is reaffirmed in 15 Hen. VI. fo. 17, pl. 12.

The general ground on which this case proceeded, that the entry by force being prohibited could confer no legal possession, must be considered as overruled in Vermont by the later case of *Mussey* v. *Scott*, 32 Vt. 82, where the landlord having a right of entry, violently broke into the premises during the temporary absence of the tenant, and was nevertheless held to have acquired a lawful possesion thereby, which he might defend by force against the tenant. The court distinguish *Dustin* v. *Cowdrey* on the ground that the act here was not within the Statutes of Forcible Entry. But this was not so. Breaking violently into a dwelling-house is as indictable as force to the person. *Rex* v. *Bathurst*, 3 Burr. 1701 and 1702. We must therefore regard this decision as a return to the earlier doctrines held by this court. In Illinois, however, in the cases of *Page* v. *Depuy*, 40 Ill. 506, *Reeder* v. *Purdy*, 41 Ill. 279, the court considering the English authority equally balanced and the American cases conflicting, adopt the conclusions of *Dustin* v. *Cowdrey*, which they consider established by incontrovertible arguments. As these cases rest therefore mainly on authority, we leave them to stand or fall with the cases on which they rely. It is merely to be remarked, that the court is consistent in its view of the effect of the statute, and consider that any violent entry, even after the tenant has abandoned the premises, is equally within the prohibition of the statute, and subjects the landlord to an action of trespass, a conclusion which no other court has ventured to adopt, and which is distinctly repudiated even by those which have sustained the action of trespass in other cases, but which is, nevertheless, the logical result of implying from the statute a liability not therein expressed; the absurdity of the conclusion not lying in the means by which it is reached, but in the doctrine from which it is drawn.

In Missouri, the true distinction is drawn, and it is held that whatever remedy the ousted tenant may have by the statutory process of restitution, he cannot maintain trespass against the landlord. *Krevet* v. *Meyer*, 24 Mo. 107; *Fuhr* v. *Dean*, 26 Mo. 116.

In Massachusetts, notwithstanding some general *dicta* or decisions not duly limited, the law is clearly in accordance with the English law, and an action lies by the tenant neither for a forcible entry nor for forcible expulsion if no unnecessary force is used. The early case of *Sampson* v. *Henry*, 11 Pick. 379, in which the *dictum* of Judge Wilde occurs, which he quoted at the beginning of this article, was trespass for assault. The plaintiff was beaten with a pitchfork by the landlord while the latter was effecting an entry; and the language used by the court so far from announcing the doctrine, sought to be derived from it, of the general unlawfulness of force, was immediately preceded by the statement, that the defence claimed was "the right not only of breaking open the house and entering therein with force and violence, but also of committing an assault with a dangerous weapon." The whole simply means that as improper force was used, trespass for assault lay. That trespass *qu. cl.* did not lie, was held in the same case in 13 Pick. 36. In *Miner* v. *Stevens*, 1 Cush. 482, 485, the same judge cites the English and New York cases, which had held that possession could be regained by force, and that no action lay, and declares this to be the law of Massachusetts. In *Meader* v. *Stone*, 7 Met. 147, an action of trespass *qu. cl* was held not maintainable by a tenant at sufferance against his lessor. The same decision was made in *Curtis* v. *Galvin*, 1 Allen 215, where the tenant was forcibly removed, and in *Moore* v. *Mason*, *Ib.*406, where the entry was forcible. In *Commonwealth* v. *Haley*, on indictment against the landlord for assault on the tenant with a hatchet, the court held, that the landlord, if resisted in taking possession, must desist, and did not limit this proposition as they should, to the case of a criminal proceeding; but in *Mugford* v. *Richardson*, 6 Allen, 76, an action of tort in the nature of trespass was held not to lie against a landlord, who, after taking peaceable possession of part of the premises, overcame with force the tenant's resistance to his repossession of the remainder. The same law was laid down in *Winter* v. *Stevens*, 9 Allen, 526, 530, where the circumstances where even stronger, entry being made by the owner accompanied by five men and the tenant being ejected with force. The general doctrine that expulsion was mere aggravation in trespass *qu. cl.*, and answered by plea of title, was declared in *Merriam* v. *Willis*, 10 Allen, 118, and the right to expel with necessary force affirmed in *Pratt* v. *Farrar*, *Ib.* 519, 521, and decided in *Morrill* v. *De la Granja*, 99 Mass. 383. Clearly, therefore, no civil action is maintainable in Massachusetts by inference from the general prohibition of the statute.

It will have been apparent from the cases cited in this discussion and the principle upon which they have gone, that no such distinction exists as has sometimes been intimated, restricting the right to expel to cases where the entry has been peaceable. No such distinction has ever been decided to obtain, but the doubt has arisen from the language of the courts; as, for instance, in *Mugford* v. *Richardson*, *supra*, where it is said, "the landlord being in peaceable possession had the right to use force," &c., whence the inference has been suggested that such peaceable possession was a condition precedent to the right to expel. But it has been clearly established from the cases, that the possession gained by force is as legal as if gained peaceably and equally efficient to revest title, the criminal liability in no way affecting the efficacy of the entry civilly.

A doubt might also arise from a hasty perusal even of some of the cases which authorise a forcible repossession by the lessor, from the terms employed by the courts to describe the amount of force permissible. Thus in *Winter* v. *Stevens*, 9 Allen, 526, 530, it is said that a tenant at sufferance may be ejected "by force if reasonable and without a breach of the peace, and not disproportionate to the exigency." But any force applied to a person against his will is an assault and a breach of the peace. The exception intended is merely excessive force. The language of Parke, B., above cited, is clearer, and admits of no such ambiguity. See *Harvey* v. *Brydges*, *ante*.

If excessive force is used, the landlord is liable for such excess, but only in an action of trespass for assault. Such excess, whether occurring in the entry or subsequent expulsion, does not affect the legality of that entry or of the possession thereby acquired, but merely fails to receive from that possession the protection which a proper use of force would have had. Thus, in *Sampson* v. *Henry*, 11 Pick. 879; 18 Pick. 36, the landlord though liable for the excess of force in trespass for assault, was not liable in trespass *qu. cl.*. It has been intimated that by such excess of force the landlord becomes a trespasser *ab initio*, as his authority to enter is one given "by law" within the distinction taken in the *Six Carpenters' Case*, 8 Co. 146 a; *Whitney* v. *Sweet*, 2 Fost. 10. But this seems to be a misapprehension. Even if the authority of the lessor to enter, arising from the contract of demise by the expiry of the tenant's title in accordance with its nature or its terms, could not be regarded as given by "the party" rather than by "the law," still "the abuse of the authority of law which makes a trespasser *ab initio* is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts legal, which the law does not forbid:" *Page* v. *Esty*, 15 Gray, 198. It was accordingly held in this case that the right of the owner to expel, flowing from title, was not such a special and particular authority, and that the owner was liable only for excess of force. A similar rule was applied in *Johnson* v. *Hannahan*, 1 Strob. 313, and the doctrine of trespass *ab initio* was limited to cases where the act without a license would be a trespass, such as the right to distrain, and did not apply where the entry was under title.

But while it is clearly the English law, and the undoubtedly preponderating opinion in the American courts, that no civil action lies against a landlord for regaining with force the demised premises, unless there is excess of force, and then only for such excess; yet in regard to the statutory process for restitution, we apprehend that in America the prevailing rule is the reverse, and that by this proceeding the landlord may be compelled to give up a possession obtained by violent means. In England, restitution was always the fruit of a criminal process, it being awarded only where the party forcibly entering had been convicted, or at least an indictment had been found, or where the force had been found on inquisition before a justice of the peace,—an officer of purely criminal jurisdiction. See Dalton's Justice, c. 44.* In no case, moreover, was restitution made, except to a freeholder under the Stat. 8 Hen. VI., or to a tenant for years under the Stat. 21 Jac. 1. Under these statutes, where a writ of restitution was sought it was requisite for the title of the plaintiff to be truly set out, and mere possession made a *prima facie* title, only if not traversed; *Rex.* v. *Wilson*, 8 T. R. 357, 360; 2 Chit. Crim. Law, 1136. But in the United States almost universally restitution is given on a summary civil process. We do not propose here to give in detail the various enactments by which this is conferred, but it may be said generally with substantial accuracy that a bare peaceable possession without title suffices for its maintenance. Taylor, Land. & Ten. (5th ed.) sec. 789, n. 5. This is especially true of the Western States, where this statute was regarded as the means to prevent entirely the use of force in the assertion of title, an evil mainly to be apprehended in a new country; and if force was used, restitution was awarded irrespective of title, the intention being to compel title in all cases to be settled by due process of law: *King* v. *St. Louis Gas Light Co.*, 34 Mo. 34. In some States it was incorporated into the act, giving the process, that title should not be inquired into therein; Alabama Rev. Code, 1867, sec. 3307; New Jersey, Nixon's Dig. of 1861, p. 301; Iowa Code, sec. 2362; and where not so expressly enacted, the same rule was held to prevail at law. Thus, in the case last cited, following *Krexet* v. *Meyer*, 24 Mo. 107, "lawfully possessed" was constructed to mean merely, "peaceably possessed," and no proof of want of title in the complainant was admissible. The effect has been to produce in some degree the evil sought to be avoided, and a scramble for the possession is the result, as the party first in actual possession, however defective his title or clear his want of one, can only be ousted by the slow process of a real action; and the court will go through the circuity of restoring possession to a tenant at sufferance, whom they will immediately thereafter dispossess on a like summary proceeding brought by the landlord under the other branch of the statute

But, however widely elsewhere this doctrine may prevail, we doubt if it is the true construction of the statute in Massachusetts. By Gen. Stat. c. 137, sec. 1, it is enacted that "no person shall make entry, &c., except where his entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." By sec. 2, "When a forcible entry is made," &c., "or the lessee holds over," &c., "the person entitled to the premises may be restored to the possession." The language here is unlimited, and every forcible entry is prohibited and made cause for restitution. The words used are only "*may* be restored," but this could hardly be considered to give a discretion. It is apparent, however, that every forcible entry is not ground for restitution, as, for instance, on the possession of a servant: *State* v. *Curtis*, 4 Dev. & B. 222; for there the possession is in admitted subordination to the title. By the Massachusetts statute, restitution is to be made, not to the "complainant," but to the "person entitled." But no special weight can be attributed to this difference of language, as this particular expression was not part of the original Statute of Forcible Entry, Stat. 1784, c. 8, but was introduced from the Stat. of 1835, c. 89, which gave summary process against tenants, when these two acts were incorporated in one in chap. 104 of the Revised Statutes. By the Stat. of 1784, c. 8, restitution was to be made to the "complainant;" and there is no ground for attributing to the legislature, from their adoption of the expression in question, any intention to limit the class of persons who could have restitution, to those who showed title. By the Stat. of 1784, c. 8, it was given to any person dispossessed; for although the general prohibition of force in sec. 1 of chap. 137 of Gen. Stat. was not in the Act of 1784, but was first introduced by the revising commissioners in 1836, yet it was expressly stated by them to have been part of our common law, and its enactment to be merely declaratory; Commissioners' notes to chap. 104; and this has been affirmed in *Commonwealth* v. *Shattuck*, 4 Cush. 141, 144. Hence though the provincial statute of 13 William III. gave restitution only to a *disseisee*, that is, to a freeholder,—for this statute was derived from and receives the same construction as the statute 8 Hen. VI., see *Presby* v. *Presby*, 13 Allen, 284,—it is clear that the literal construction of the statute of 1784 authorized restitution to every one who complained of dispossession with force.

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* "Restitution is made by the justice, or he may certify the finding before him as a presentment or indictment to the King's Bench, as the highest criminal court. In 8 Blackst. Comm. 179, it is said that restitution is made for the 'civil injury,' and a fine for the 'criminal injury. This merely refers to the person who is to receive the penalty imposed, but does not make the proceeding in any way civil any more than the indictment against common carriers for negligence causing death is under the Massachusetts statute, because the fine goes to the representatives of the deceased."

But though neither the history nor the construction of secs. 1 and 2 of the Gen. Stat. c. 137, discloses any restriction on the class of persons "entitled" to restitution, we think such a restriction is clearly implied from another section of the same statute. It is provided by sec. 9, following sec. 13 of c. 120, that if the title is drawn in question in this proceeding by plea or otherwise, the case shall be removed and the title determined by a higher court. That this cannot refer to the clauses of this chapter relating to process against tenants holding over, is evident, for the estoppel of the tenant in this process, to contest by any plea his lessor's title, has been repeatedly recognized: *Coburn* v *Palmer*, 8 Cush. 124; *Oakes* v. *Munroe*, *Ib.* 282; *Green* v. *Tourtellott*, 11 Cush. 227. The right to introduce the issue of title can only therefore apply to the process of forcible entry; and title seems recognized by implication as a sufficient answer to the force, and to restitution therefor.

This view is strengthened by the recent decisions, which hold that in this summary proceeding, if the plaintiff's title determines *pendente lite*, judgment for possession will not issue: *King* v. *Lawson*, 98 Mass. 309; *Casey* v. *King Ib.* 503. These were, it is true, cases between landlord and tenant; but the principle upon which they proceed seems clearly to be, that, where the question of title is examinable, possession will not be awarded on a summary proceeding to one who at the time of judgment is not entitled to the premises, whatever right he may have had to institute the proceeding. The title, it may be observed, which determines the right to possession is not merely, as under the English statutes, above referred to, a subsisting freehold or term for years; but is any existing possessory right, which would authorize an action of trespass, and for this a tenancy at will is sufficient; *Dickinson* v. *Goodspeed*, 8 Cush. 119. The construction of the statutes which we suggest, does not therefore trench on the right of possession under any valid title, however slight, and it seems to be a correct conclusion, that in Massachusetts restitution by the summary statutory proceeding will not be given in any case where there is not title enough to maintain trespass; and a landlord may safely regain possession by force if he use no more than is necessary, and will incur no more liability to the statute process than to an action of trespass *qu. cl.* or for assault.—*American Law Review.*

## ONTARIO REPORTS.

### ELECTION CASE.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Reg. ex rel. Flater v. VanVelsor.

*Municipal election—Qualification of candidate—Effect of incumbrances.*

*Held*, that the fact of the property on which a candidate seeks to qualify being incumbered, cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification.

[Chambers, March 16, 1870.—*Mr. Dalton.*]

It was alleged in the statement of the relator, that Daniel J. VanVelsor had not been duly elected, and had unjustly usurped the office of deputy Reeve in the said Township of Harwich in the County of Kent, under the pretence of an election held on Monday, the 3rd of January, 1870, and it was declared that he, the said relator, had an interest in the said election as a voter, and the following cause was alleged why the election of the said VanVelsor to the said office shou'd be declared invalid and void, namely: That the said VanVelsor was not duly or legally elected or returned, in that he was not qualified, not having sufficient property qualification, he being assessed and rated as a freeholder on the last revised Assessment Roll of the Township, for certain lots, which were assessed and valued in the whole on the said Roll, at the sum of $470; and all the said lots were, at and before the said election, encumbered by a mortgage made by the said VanVelsor, to secure payment of $1125, and which was still unsatisfied and undischarged, and, also by a writ of *fieri facias* against the lands and tenements of the said VanVelsor and others, and which, at the time of the said election, remained for execution in the hands of the Sheriff of the County of Kent, having been delivered to him on 1st April, 1869, and these incumbrances were much more than the value of the said property.

A number of affidavits were filed on both sides, on which there was much discussion, but the main facts necessary for the consideration of the case, and on which it turned, as found by Mr Dalton, were as follows: That the defendant was assessed as above, at $470: that the mortgage spoken of was entirely paid before the election: that the above judgment was paid or assigned to the defendant since the election: that, at any rate, since November last, the defendant had in his possession goods liable to the execution to an amount greater than the amount of the judgment; but both the writ against goods and lands still remained in the sheriff's hands.

*John Patterson*, for the defendant, shewed cause. The defendant having paid the mortgage, that objection falls. The defendant has goods sufficient to cover the execution, and as the writ against goods must be satisfied first, the writ against lands is really no incumbrance.

*O'Brien* for the relator. The defendant has up to the present time pretended that these incumbrances were *bona fide* charges on his property, and it is only when it suits his purpose, that they are pretended to be paid or assigned; but the *fi. fa.* lands is in fact an incumbrance, even if there are goods to satisfy the claim, it binds his interest in the lands, though no sale can take place until the goods are exhausted. [Mr. Dalton—Can the fact of an incumbrance on the property, whereon it is sought to qualify, be taken into consideration here?] The statute is silent on the point, but it contemplates the necessity of the candidate having a property qualification: see 29–30 Vic. cap. 51 sec. 70; and in *Blakely* v. *Canavan*, 1 U. C. L. J N. S, 188; it seems to be taken for granted that the incumbrances are to be deducted from the value as rated. There is, however, no express decision on this point.

Mr. Dalton.—Substantially the defendant was qualified. Is he technically so under the statute?

At the time of the election the judgment and the writ against lands remained a charge. To satisfy that judgment the defendant had goods, sufficient in amount, and a writ upon the judgment against goods was in the hands of the sheriff.

The enactment as to qualification is sec. 70 29–30 Vic. cap. 51: "The persons qualified to be elected Mayors, Aldermen, Reeves, Deputy Reeves, and Councillors, or Police Trustees, are such residents of the municipality within which, or within two miles of which, the municipality or police village is situate, as are not disqualified under this Act, and have, at the time of the election, on their own right, or in the right of their wives, or proprietors, or tenants, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality, or police village, to at least the value following—(Then follow the amounts in different cases, and in this case to $400 freehold, or leasehold to $800.) "And the qualification of all persons where a qualification is required under this Act, may be of an estate either legal or equitable."

Now if the defendant's assessed qualifications of $470 is to be affected by the charge of the *fi. fa.* lands, that is, if the amount of the judgment is to be deducted from the assessed value in computing the amount, it would perhaps be difficult to decide that the possession of goods by the defendant could avoid that result. For though the goods must first be exhausted before the lands can be sold to satisfy the judgment, or even though the defendant had money in the bank for that purpose, still, if liens and encumbrances are to be taken into account, the *fi. fa* lands, so long as the judgment is unsatisfied remain a lien—and it would perhaps require some express provisions to enable me to set first against that lien other countervailing assets, and thus to free the land.

But can charges of this nature be taken into account at all? I have looked for cases upon this point but find none—I find the point taken in argument, and in one case noticed in the judgment, but never that I can see decided.

The words of the statute are, "have at the time of the election in their own right, or in the right of their wives, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality &c." If the clause means such a thing, no word is said as to the *value beyond incumbrances*, or any thing at all of value, except the value as "rated" by the assessor. The facts necessary in strict grammatical construction are, that they shall have the estate at the time of the election, and that it was rated in their names at the proper amount on the last revised assessment roll.

But how is it held in analogous cases? Take the case of voters at municipal elections—their right depends upon the 75th section (now varied by the Statute of Ontario, but not as affecting the present matter)—they must be severally, but not jointly rated on the then last revised assessment roll, for real property held in their own right or that of their wives, as proprietors or tenants—and the clause declares such rating absolute and final. Certainly in this case the law permits no enquiry into incumbrances.

The only oath that can be administered to a freeholder appearing on the roll to have the proper qualification is, that he is of the full age of twenty-one years, is a natural born or naturalised subject, that he has not before voted at that election and that he is the person named in the Roll: see *Reg. ex rel. Ford* v. *Cottingham*, 1 U. C. L. J. N. S. 214; *Reg. ex rel. Chambers* v. *Allison*, Ib. 244.

Then as to parliamentary elections (section 81) the law is as I take it the same. The requirement is, that they should be entered on the last revised assessment roll, as the owner or occupant of real property, of the actual value &c. No encumbrance affects the right. There can be no enquiry as to qualification except as to the identity of the party with the name on the roll

I will notice two other cases where the legislature has intended an opposite effect, and has expressed it very clearly.

As to candidates at parliamentary elections, the qualification is to the value of £500 sterling, expressed to be "over and above all rents, charges, mortgages and incumbrances, charged upon and due and payable out of or affecting the same;" Imp. Stat. 8-4 Vic. cap. 35, sec. 28. No one can have doubt or hesitation here.

Then take the case of magistrates. By Consol. Stats Canada, cap. 100, sec 8, the qualification must be "over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents &c., payable out of or affecting the same"

Looking at the careful and explicit language used in these cases, it seems not reasonable to conclude that in the case of municipal candidates the legislature meant any more than the grammatical meaning of the language used conveys, and I therefore think that the defendant being rated in his own name on the last revised assessment roll for a freehold estate—of the proper value—and having that estate at the time of the election, is properly qualified, and that the judgment standing against him does not affect it.

I must give the costs against the relator, as it does not appear that exertions were made to ascertain whether the incumbrances charged as affecting the valuation were existing at the time of the election.

*Judgment for defendant with costs.*

## Regina ex rel. Gibb v. White.

*Municipal election—Disqualification—Indians—Enfranchisement.*

An Indian, who is a British subject and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount), has an equal right with any other British subject to hold the position of Reeve of a municipality, even though not enfranchised, and receiving as an Indian a portion of the annual payments from the common property of his tribe.

[Chambers, March 23, 1870—*Mr. Dalton.*]

*O'Brien*, for the relator, obtained a *quo warranto* summons to try the validity of the election of the defendant to the office of Reeve of the Township of Anderdon, in the County of Essex.

The statement of the relator complained that Thomas B. White had not been duly elected to the office of Reeve in the Township of Anderdon and usurped the office under the pretence of an election held on the first Monday in January; and that Dallas Norvell of Anderdon aforesaid, merchant, was duly elected thereto, and ought to have been returned at the said election; and the following causes were stated why the election of the said T. B. White to the said office should be declared invalid and void, and the said Dallas Norvell be duly elected thereto, namely:—That the said Thomas B White was an Indian, and a person of Indian blood, and an acknowledged member of a tribe of Indians, and not in any way enfranchised or exempted from the disabilities of Indians, and as such was disqualified from holding the property qualification necessary to entitle him to such office, and that therefore he had not the necessary qualification, either of property or otherwise, and that the said Dallas Norvell was the only other candidate for the said office, and should be declared elected.

There appeared to be no dispute about the facts of the case. The defendant was born in Ontario, as was his father before him; he was the son of the Chief of the Wyandotts, or Huron Indians, of Anderdon; he was never "enfranchised" under our statute, and from time to time received his portion of the annual payments from the property of his tribe; he had for the last twelve years been engaged in trade—latterly rather extensively; he had been for some years the owner in fee simple of patented lands in Anderdon, on which he lived; but these lands were not allotted to him from the lands of the tribe, but were acquired by himself. The value was beyond the necessary qualification.

*Osler*, shewed cause.

*O'Brien*, contra.

Con. Stat. Can. cap. 9; Con. Stat U. C. cap, 81; 81 Vic (Can) cap. 42; 32, 83 Vic. (Can.) cap. 6; Treaty and Proclamation in Public Acts, 1768 to 1834. [20], [32]; *Reg.* v. *Baby*, 12 U. C. Q B. 846; *Totten* v *Watson*, 15 U C. Q B. 894; *The Cherokee Nation* v *The State of Georgia*, 5 Peters 60; 2 Kent's Com. 72, 78, 8 *Ib.* 881, were cited on the argument.

Mr. Dalton.—There is a marked difference in the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen, see the case in 5 Peters 1, 27, 58, 60: "The Act of Congress confines the descriptions of aliens capable of naturalization to *free white persons*. * * * It is the declared law of New York, South Carolina and Tennessee, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of the government, and consequently they can never be made citizens under the Act of Congress."—2 Kent's Com. 72, 78.

In this Province they are subjects. Con. Stat. Can. cap. 9, so speaks of them (see preamble, and sec. 1, also the 16th sec. of the Act of last session) But authorities are needless for such a proposition. Chapter 9 (now repealed), was the Act in force for many years down to 1869, declaring the rights, and providing for the management of the property of the Indians, and its provisions have much to do with the present matter. The word *Indian* in that Act (sec. 1) is defined to mean only Indians, or persons of Indian blood, or intermarried with Indians acknowledged as members of Indian tribes or bands, residing upon lands which have never been surrendered to the Crown, or which having been so surrendered, have been set apart, or are reserved for the use of any tribes or band of Indians in common, *and who themselves reside upon such lands*. But any Indian (sec 2) who is seized in fee simple in his own right of patented lands in Upper Canada, assessed to $100 or upwards, is excluded from the definition, and is not an Indian within the meaning of the Act. The Act goes on to provide means for the "enfranchisement" of the Indians, meaning the class so defined, and the apportioning to those enfranchised parcels of the lands of the tribe, to be held by such enfranchised Indians in severalty. And it confers certain immunities on the Indians, and subjects them to certain disabilities, always having reference, as I understand, to the above description of the class to which the Act applies. If this Act were now in force, whatever effect it might have on the defendant's position to be within it, I suppose he would not be within it, for he does not live with the tribes on their reserved land, but is the owner in fee simple of patented lands of greater assessed value than $100, not set apart from the lands of the tribe, but acquired by himself.

That Act however is repealed, and the Acts now in force are 31 Vic. cap. 42, and 32 & 33 Vic. cap. 6 of Canada. The only immunities or disabilities of an Indian now, whether enfranchised or unenfranchised, relate to the property he acquired from the tribe, and that no person can sell to him spirituous liquors, or hold in pawn anything pledged by him for spirituous liquors. But Indians may now sue and be sued, and have, except as above, so far as I can see, all the rights and liabilities of other subjects.

In *Totten* v. *Watson*, 15 U. C. Q. B., 392, the Court of Queen's Bench, in the time of Sir John Robinson, decided that the prohibition of sale of land by Indians, applied only to reserved lands, not to lands to which any individual Indian had acquired a title; and from this case and sec. 2, cap. 9, Con. Stat. Can., it is quite plain that an unenfranchised Indian might purchase and hold lands in fee simple. The defendant then has the necessary property qualification. Being a subject he must have all the rights of a subject which are not expressly taken away; then why is he not qualified to be Reeve of a township? it is certainly for the relator to show why. I think that he is qualified, and that judgment must be for the defendant with costs.

*Judgment for defendant with costs.*

## ENGLISH REPORTS.

## COMMON PLEAS.

### Yglesias v. The Royal Exchange Assurance.

*Evidence—Commission to examine witnesses abroad—Costs of sending a barrister from England.*

In cases of great importance and intricacy the master may allow the successful party, on taxation of costs, the expenses of sending out an English barrister on a commission to examine witnesses abroad.

[C. P. 18 W. R. 381, Jan. 29, 1870.]

This was an action on a marine policy of insurance on cochineal from the Canary Islands to this country, and at the trial before the Chief Justice at the Guildhall a verdict was found for the plaintiff. The defence raised was that the plaintiff, who had made advances on the cochineal and represented the shippers, had fraudulently shipped barley instead of cochineal, barley being of far less value than cochineal, and had then jettisoned it, and made this claim on the defendants for the sum insured on the cochineal. At the instance of the defendants criminal proceedings had been taken against the shippers in the Spanish courts.

Before trial the plaintiff obtained a commission to examine witnesses in the Canaries to prove the fact of the shipment of the cochineal, and appointed three commissioners, two of whom were mercantile men residing in the islands, and the other was an English barrister sent out from this country. The latter was the only commissioner for the plaintiff who actually sat. The defendants also sent out a barrister from this country as a commissioner, and he cross-examined the plaintiff's witnesses, but called none himself though he was at liberty to do so. The examination itself occupied twenty-two days. On taxation of costs for the plaintiff the master allowed a claim amounting to £575 for his legal commissioner going to the Canaries and sitting there.

*Watkin Williams* moved for a rule to review the taxation, on the ground that the master ought not to have allowed the costs of an English barrister going to the Canaries to conduct a commission. He contended that from the proceedings in the Spanish criminal courts the details of the case were well known, and that the plaintiff ought to have been satisfied with one of the mercantile men on the spot as his commissioner. He cited *Potter* v *Rankin*, 17 W. R C. L. Dig. 31, 38 L J. C. P. 130, L. R. 4 C. P. 76.

*J. C. Matthews* showed cause in the first instance, and contended that it was a matter in the discretion of the master.

Bovill, C. J.—The Court cannot lay down any rule that shall be applicable to all cases. Generally speaking the master would never think of allowing the expenses of a barrister sent out from this country. But there may be cases of overwhelming importance in which it would be necessary to send one out. There is no rule against it, but it must depend entirely on the nature and circumstances of the case. This was a case of overwhelming importance to the plaintiff and the shippers whom he represented, and the investigation was very complicated and of the most minute description. Over 800 questions were put in cross-examination by the commissioner for the defendant, and when the trial came on before me it lasted five days, and mainly turned on the interrogatories. The matter was in the discretion of the master, who investigated it with the papers and briefs before him, and before we interfere it must be clearly shown that he has exercised his discretion wrongly. So far from that being the case, I think he was positively right in allowing these expenses.

Montague Smith, J., concurred.

Brett, J.—As a rigid rule must very often lead to injustice, it is best for the master to act on his discretion. Yet the Court is not to act on a rigid rule of not interfering.

*Rule discharged.*

### Penton v. Murdock.

*Negligence—Contagious disease—Glandered horse.*

Declaration that defendant knowingly delivered a glandered horse to the plaintiff to be put with his horse without telling him it was glandered; whereby the plaintiff, not knowing it was glandered, was induced to and did put it with his horse, *per quod* his horse died.

*Held*, after verdict for plaintiff, a good declaration, though no concealment or fraud or breach of warranty was averred.

[18 C. P. W. R. 382, Jan. 25, 1870.]

Declaration—For that the defendant wrongfully kept a horse well knowing the same to be glandered and to be in a contagious, infectious, and fatal disease called glanders, and well knowing the premises wrongfully delivered the said horse to the plaintiff, to be kept and taken care of by the plaintiff for the defendant in a stabl of the plaintiff with another horse of the plaintiff, and without informing the plaintiff that the said horse was glandered or had the said disease; by means of which premises the plaintiff, not knowing that the said horse of the defendant was glandered or had the said disease, was induced by the defendant to and did place the same in the said stable of the plaintiff with the said horse of the plaintiff, and the said disease was thereby communicated by the said horse of the defendant to the said horse of the plaintiff, *per quod* the plaintiff's horse died, &c.

On verdict found for the plaintiff,

*Waddy* moved in arrest of judgment, on the ground that the declaration disclosed no cause of action, inasmuch as it did not state any concealment, or fraud, or breach of warranty on the part of the defendant. He cited *Hill* v. *Balls*, 5 W. R. 740, 2 H. & N. 299, 27 L. J. Ex 45, and relied on the following passage in the judgment of Martin, B., in that case:—"In my view of the law, where there is no warranty, the rule *caveat emptor* applies to sales, and, except there be deceit, either by a fraudulent concealment or a fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor upon the sale of a horse or other animal."

Bovill, C.J.—The case is different from *Hill* v. *Balls*. There Martin, B., says, "It is consistent with everything averred in this declaration that the defendant told the auctioneer that the horse was glandered, and to sell him as such, and, indeed, that the plaintiff may have been so told, but that, relying on his own judgment, he believed the horse was sound, and bought him notwithstanding that he had notice that the horse was unsound." Any such supposition is excluded by the averments in this declaration, and the defendant must be held to have contemplated the consequences of his act, which were that the plaintiff's horse caught the disease and died.

Montague Smith, J.—The declaration avers that the defendant induced the plaintiff to put the defendant's horse in a stable with a horse of the plaintiff, the defendant knowing, and the plaintiff not knowing, that the defendant's horse was glandered. I do not see what more there can be to constitute the cause of action. The plaintiff's ignorance is clearly averred, and, therefore *Hill* v. *Balls* does not apply.

Brett, J.—We must take it now that the defendant delivered the horse to the plaintiff for a particular purpose—viz., to be kept in a stable with another horse of the plaintiff, and that the defendant induced him to take it for that purpose. If the defendant did so, and knew that his horse was glandered, and knew that it was a contagious and fatal disease, that would raise a duty on his part to tell the plaintiff of it, and it averred, not only that he did not tell the plaintiff, but that the plaintiff did not know it. The case is distinguishable from *Hill* v. *Balls*, because there was no averment there that the horse was delivered to be put near any other horse at all, and, as Martin, B., pointed out, allegations were wanting of the plaintiff's ignorance.

*Rule refused.*

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# DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

### FOR NOVEMBER AND DECEMBER, 1869, AND JANUARY, 1870.

*(Continued from page 138.)*

False Pretences—*See* Fraud.

Family Name.

An illegitimate son of a former slave of the DuB. family in St. Lucia assumed their name and did business under it for over ten years. The DuB.s now seek to restrain him. *Held*, that the action did not lie, especially after such long delay. *Semble*, that by the law of England the assumption of a family name by one who was never before called by it is a grievance for which there is no redress.—*DuBoulay* v. *DuBoulay*, L. R. 2 P. C. 430.

Felony—*See* Venire de Novo.

Fishery.

A several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old to the new channel.—*Mayor, &c., of Carlisle* v. *Graham*, L. R. 4 Ex. 361.

Fixture.

In the absence of special contract, tenants' fixtures cannot be removed after the termination of the lease by breach of condition and re-entry.—*Pugh* v. *Arton*, L. R. 8 Eq. 626.

Foreign Judgment—*See* Limitations, Statute of.

Foreign Office.

The funds voted by Parliament to the Foreign Office and received by the latter from the treasury, are not trust funds, of the application of which Chancery has any jurisdiction to take an account.—*Grenville-Murray* v. *Earl of Clarendon*, L. R. 9 Eq. 11.

Forgery.

It is forgery to make a deed fraudulently with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.—*The Queen* v. *Ritson*, L. R. 1 C. C. 200.

Fraud.

If A., by fraudulent representations that the drawer and acceptor of a bill are solvent, and that A. intends to advance a sum upon it, induces B. to hand him a sum, nominally, to be advanced on the same, in fact, as a scheme to obtain the money for A.'s own purposes, there is jurisdiction in equity as well as at law.—*Ramshire* v. *Bolton*, L. R. 8 Eq. 294.

*See* Company, 1, 2; Partnership; Power, 8.

Frauds, Statute of.

G , a broker, signed the following, in which the words in italics were erased: "M. C. & Co , having refused to see Mr. H. into the 'Builders' Arms,' New Road, for £50, Mr. H. now informs me he can muster £60 cash; such being the case, *subject to their approval*, I hereby agree to get the lease and every thing, for such sum of £60 cash." G had no interest in the public house in question. *Held*. (1) Keating, J., *dubitante*, that the contract was within the Statute of Frauds, s. 4; (2) that the memorandum was sufficiently definite The lease referred to might be shown orally, and "every thing" explained by a previous agreement. A new trial was ordered to determine at what time the erasure was made.—*Horsey* v. *Graham*, L. R. 5 C. P. 9.

Freight—*See* Bottomry Bond.

Highway—*See* Dedication.

Husband and Wife.

An agreement between a husband and the father of his wife, on her behalf, executed also by the wife, that the husband and wife should live apart, and that the husband should execute, when required, a deed of separation, to contain all usual and proper clauses, and also to secure £40 a year for the maintenance of his wife and child, was decreed to be specifically performed.—*Gibbs* v. *Harding*, L. R. 8 Eq 490.

*See* Alimony; Connivance; Costs, 5; Cruelty; Desertion; Maintenance; Marriage Settlement; Negligence, 1.

Illegal Contract—*See* Bond, 1; Covenant.

Illusory Suit.

A bill filed by a member of a society against the directors to restrain proceedings alleged to be *ultra vires*, was ordered to be taken off the file upon evidence that the plaintiff was a person of small means who had purchased one share in the society (for £2) for the purpose of instituting the suit, and that the suit was really instituted by his solicitor, who was not a shareholder, to annoy two of the directors.—*Robson* v. *Dodds*, L R. 8 Eq. 301.

Incumbrance—*See* Tenant for Life and Remainder-man.

Injunction—*See* Illusory Suit; Trade-mark.

Insolvency—*See* Bankruptcy; Partnership; Winding Up.

Inspection of Documents.

Before moving the court for an order for inspection of documents, previous application should be made to the parties in possession of them; unless the applicant does so, he may be condemned in costs.—*The Memphis*, L. R. 3 Ad & Ec.

Insurance.

Defendant insured plaintiff's goods by a policy containing the usual suing and laboring clause. On the voyage the vessel was seized and carried into a United States prize court. This the plaintiff elected to treat as a partial loss. But when, after judgment against them, the captors appealed, the plaintiff gave notice of abandonment, which defendant refused to receive. Afterwards the goods were sold, as plaintiff and defendant both declined to give bail for their value, estimated in paper currency at 180 per cent. discount. *Held*, that the appeal by the captors was not such a change of circumstances as to authorize the plaintiff to change his election and abandon, but that the sale was a total loss occasioned by the seizure, for as a conclusion of fact, a prudent uninsured owner would not have given bail as above to prevent it.—*Stringer* v. *English, &c., Insurance Co.*, L. R. 4 Q. B 676.

*See* Contract, 1; Reformation of Instruments.

Interest

A deposit of title-deeds to secure a loan, without more, entitles the lender to interest. Four per cent. allowed —*In re Kerr's Policy*, L. R. 8 Eq. 331.

*See* Apportionment; Damages, 2, 3; Tenant for Life and Remainder-man.

Investment—*See* Company, 2.

Jurisdiction—*See* Company, 1; Foreign Office; Fraud; Statute; Voluntary Association.

Landlord and Tenant—*See* Fixture.

Larceny.

A., the auctioneer at a mock-auction, knocked down some cloth for 26*s*. to B., who had not bid for it, as A. knew. B. refused to take the cloth or to pay for it, whereupon A. refused to allow her to leave the room unless she paid. B. then paid, because she was afraid, and took the cloth. *Held*, that these facts would sustain a conviction for larceny, and that under the circumstances it did not matter that the jury were not instructed that the taking must have been against the will of B.—*The Queen* v. *McGrath*, L. R. 1 C. C. 205.

Legacy.

1. A testator bequeathed a leasehold house to A. and £100 to B , describing each as "one of my trustees and executors hereinafter named," and appointed them as such. B. died

without having proved the will or renounced the trusts. *Held*, that B. was entitled to the £100. The inequality of the gifts to A. and B. rebutted the presumption that they were given to them as executors only.—*Jewis* v. *Lawrence*, L. R. 8 Eq. 345.

2. A. was appointed executor of a will, and a legacy was left him for his trouble. A., being in Australia, sent home a power of attorney to B., who administered the estate and received rents under the same. A. died without proving the will. *Held*, that A. had sufficiently shown his intention to act as executor to entitle his representatives to the legacy.—*Lewis* v. *Mathews*, L. R 8 Eq. 277.

3. A testator directed his executors to appropriate so much consols as would produce the clean income or sum of £100 a year, and pay such income or yearly sum to a charity. *Held*, that the legacy was given free of duty.—*In re Coles' Will*, L. R. 8 Eq. 271.

4. A testator, among other legacies, gave £1,000 on certain trusts for A. and B., and failing these, the sum was to become part of the residuary estate, which was left to B., C., *et als*. By a codicil he gave one pecuniary legacy, and declared that in case his personal estate at the time of his decease should be insufficient to pay all the legacies in full, they should abate proportionably. The personal estate was insufficient, and there was £598 to answer the £1,000, the trusts as to which failed. *Held*, that the £598 was to be divided among the pecuniary legatees, excluding the residuary legatees.—*In re Lyne's Estate*, L. R. 8 Eq. 482.

*See* Charity; Contribution; Legacy Duty; Mortmain; Power, 1, 2; Revocation of Will; Will, 2–18.

**Legacy Duty.**

Under a will, the income of a fund directed to be laid out in real estate, was paid to A. for life, then to B. for life; and then, by the will, the fund became due to C., the heir of the testator, who refused to receive either income or principal. The fund, which had never been laid out in land, was now payable to the heir of C. *Held* (*per* Kelly, C.B. & Channell, B.), that duty was payable under the Legacy Duty Act (36 Geo. III. c. 52). *Per* Bramwell & Cleasby, BB., that it was payable under the Succession Duty Act (16 & 17 Vict. c. 71), as on a succession from C. as "predecessor." The principle of equitable conversion applies. *Per* Kelly, C.B.: It does not. *Per* Bramwell, B.: It comes to the same thing either way, A., B., and C. having died since St. 55 Geo. III. c. 184.—*In re DeLancey*, L. R. 4 Ex. 345.

*See* Legacy, 3.

**Lex Loci**—*See* Bottomry Bond, 1; Limitation.

**Libel**—*See* Action; Privileged Communication, 2.

**Lien**—*See* Railway, 3.

**Life Insurance**—*See* Contract, 1.

**Limitations, Statute of.**

1. In an action brought in the Isle of Man on a Manx contract, judgment was for the defendant, on the ground of the Statute of Limitations. An action was then brought in England where the statute had not run. *Held*, that the Manx judgment was no bar.—*Harris* v. *Quine*, L. R. 4 Q. B. 653.

2. The period of limitation of actions is determined by the *lex fori*.—*Ib.*

A statute (19 & 20 Vict. c. 97, s. 10) which did away with the exception from the old Statute of Limitations in favor of parties beyond seas, where their cause of action accrued, was *held* to apply to cases where the cause of action accrued before the statute was passed, although other sections of the statute had been held not retrospective.—*Pond* v. *Bingham*, L. R. 4 Ch. 735; s. c. L. R. 6 Eq. 485; 3 Am. Law Rev. 688.

3. The statute does not begin to run against an attorney's bill for conducting a suit when judgment is given in the courts where it was begun, if an appeal is brought which is conducted by the same attorney.—*Harris* v. *Quine*, L. R. 4 Q. B. 653.

4. The Statute of Limitations is not a bar to a bill to dissolve a partnership and take the usual accounts, although the partnership has been discontinued more than six years.—*Miller* v. *Miller*, L. R. 8 Eq. 499.

*See* Trust, 2.

**Maintenance.**

After a decree for judicial separation for the husband's adultery, the custody of the children being given to the wife until the court should otherwise direct, an order was made for maintenance, although the husband asked that the children might be given up to his father and sister, who offered to bring them up at their own cost.—*Milford* v. *Milford*, L. R. 1 P. & D. 715.

**Marriage**—*See* Equity Pleading & Practice, 2.

**Marriage Settlement.**

1. Husband and wife covenanted to "concur and join in" conveying upon the trusts of a settlement all property to which the wife, or the husband in her right, might thereafter become entitled by the will or intestacy of, or

by gift from the wife's father, or any other person. *Held*, that the covenant applied to a sum which vested in interest, under the wife's father's will, before, and in possession after the husband's death, but not to property left to the wife by the husband's own will.—*Dickinson* v. *Dillwyn*, L. R. 8 Eq. 546.

2. So a joint and several covenant to settle property to which the wife, her executors or administrators, or the husband, his executors or administrators, in her right, should "at any one time hereafter" become entitled, does not apply to property received by her under her husband's will.—*Carter* v. *Carter*, L. R. 8 Eq. 551.

Master—*See* Bottomry Bond, 1.

Master and Servant—*See* Contract, 2.

Merger—*See* Will, 10.

Minister.

Trustees held a house and other property for the use of a dissenting congregation, and to permit the minister for the time being to occupy the house. The church members invited G. to become co-pastor with the then minister. Afterwards they voted to dismiss him, and a majority of the trustees concurred. G. claimed to hold for life, no misconduct being charged. *Held*, that G. was rightfully dismissed.—*Cooper* v. *Gordon*, L. R. 8 Eq. 249.

*See* Voluntary Association.

Misdemeanor.

The taking a false oath on a material point where an affidavit is required for the purposes of a statute, is punishable as a misdemeanor at common law.—*The Queen* v. *Hodgkiss*, L. R. 1 C. C. 212.

Misrepresentation—*See* Trade Mark; Vendor and Purchaser, 1.

Mistake—*See* Reformation of Instruments.

Money Had and Received—*See* Fraud; Trust, 1.

Mortgage.

1. A direction to trustees to raise money by mortgage of an estate in such manner as they shall think fit, authorizes them to give a mortgage with a power of sale.—*In re Chawner's Will*, L. R. 8 Eq. 569.

2. When a mortgagor had executed an agreement to deliver up possession of the mortgaged property, and to release all his interest to the mortgagee, and after twelve years had elapsed without the agreement having been acted on, the property was sold: *Held*, that the mortgagor was entitled to the surplus of the purchase-money.—*Rushbrook* v. *Lawrence*, L. R. 5 Ch. 3.

*See* Interest; Priority; Will, 10; Winding Up.

Mortmain.

A legacy "to be given, used or employed . . . toward the erection of a new Wesleyan chapel at H., instead of the one now in use, when such an erection shall take place," is void under the Statute of Mortmain. *Booth* v. *Carter*, L. R. 3 Eq. 757; 2 Am. Law Rev. 118; denied—*In re Watmouth's Trusts*, L. R. 8 Eq. 272.

Name—*See* Family Name.

Navigable Water.—*See* Fishery.

Negligence.

1. J. G. and E. G. sued S., alleging that J. G. bought of S., as a hair-wash for the use of E. G., his wife, a chemical compound made up of ingredients known only to S., and by him represented to be "fit and proper to be used for washing the hair," and that S. knew that the purchase was made for the use of E. G.; yet that the defendant so negligently, &c. conducted himself in making and selling the said compound, that, by reason thereof, it was unfit to be used for washing the hair, whereby E. G., who used it for that purpose, was injured. Demurrer. *Held*, that E. G. had a good cause of action.—*George* v. *Skivington*, L. R. 5 Ex. 1.

2. Plaintiff, intending to travel by defendants' road, asked a porter at their station about the time of the train's leaving, and was directed to look at a time-table inside the station. While he was doing so, a plank and a roll of zinc fell through a hole in the roof and injured him, and at the same time the legs of a man appeared through the hole. *Held*, that there was no evidence of defendants' negligence to go to a jury.—*Welfare* v. *London & Brighton Railway Co.*, L. R. 4 Q. B. 693.

3. In consequence of a defect in the lock of a railway-carriage door, which was owing to the negligence of the defendants, the door would not stay shut, and in shutting it for the fourth time a passenger in the carriage fell out and was hurt. He could have sat away from the door, or have got into another carriage, as the train stopped thrice after the door first opened and before the accident, and, in three minutes after it, reached the next station. *Held*, that the accident was not the immediate result of defendants' negligence, and that they were not liable.—*Adams* v. *Lancashire & Yorkshire Railway Co.*, L. R. 4 C. P. 739.

*See* Company, 1; Principal and Agent; Ship, 1; Telegraph.

New Trial—*See* Venire de Novo.

Notice—*See* Bills and Notes; Priority; Registry of Deeds.

Parent and Child—*See* Maintenance.

Parish—*See* Minister.

Parties—*See* Railway, 3.

Partition.

1. A., and B. her husband, a bankrupt, mortgaged A.'s share in real estate, of which she was tenant in common in fee, to C. Then A , B. and C filed a bill for partition. Afterwards C. got in the estate outstanding in B 's assignee, and the bill was amended. *Held*, that such a suit could not be maintained by a tenant in common in remainder; and that an interest in possession, acquired after the bill was filed, could not be set up.—*Evans* v. *Bagshaw*, L. R. 8 Eq. 469.

2 A decree for partition was made, declaring that the plaintiffs were entitled to an undivided moiety of a field, although the defendants disputed the title, and objected that the title claimed was legal.—*Giffard* v. *Williams*, L R 8 Eq 494.

Partnership.

The firm of K. & Co. was insolvent. K., wishing and being entitled by the partnership articles to withdraw £4000. received from the firm the first of three sets of bills for £4000, made payable to the order of the firm and indorsed to him. K died before the bills were paid, and the first set were lost. The surviving partners executed a creditor's deed, and the second set of bills, which were not indorsed, were claimed by the trustees. *Held*, that K. was not entitled to withdraw the £4000 when the firm was insolvent; and that, as the money had not actually reached his hands, it belonged to the joint creditors —*In re Kemptner*, L R. 8 Eq. 286.

*See* Limitations, Statute of.

Patent.

1. In a bill to restrain the infringement of a patent, an express averment of the novelty of the invention protected by the patent is not necessary.—*Amory* v. *Brown*, L. R 8 Eq 668.

2. The object of a patent was described as "being to produce a glazed lamp, the frame of which shall throw little or no shadow, and yet possess the requisite strength, and also facilities for lighting and cleaning," and protection was claimed for the arrangement and combination of parts as described. One feature in the lamp was a sliding, spherical door. *Held*, that, as this would not have been patentable singly, it was not protected as part of the combination.—*Parkes* v. *Stevens*, L. R. 7 Eq. 358; s c. L. R. 5 Ch. 36.

*See* Action.

Payment

A limited company and a firm employed A. to build a ship for them; payment to be one-third cash, and balance by the company's acceptance at four months, or, at A.'s option, by the firm's acceptance A took the firm's bills, which were dishonored, but he gave no notice to the company *Held*, that A. could prove against the company for the debt for which the bills were given.—*In re British and American Steam Navigation Co.*, 1 L R. 8 Eq. 506.

*See* Appropriation of Payments; Contract, 1.

Perjury—*See* Misdemeanor.

Photograph—*See* Copyright.

Pilot—*See* Costs, 4; Ship, 2.

Pleading

The rule that pleadings are to be taken most strongly against the pleader, does not apply to a matter peculiarly within the knowledge of the other party, in an equitable plea, which has been demurred to.—*Murphy* v. *Glass*, L. R 2 P. C. 408.

*See* Award, 3; Patent, 1.

Pledge—*See* Winding Up.

Power.

1. A. having a power of appointing a fund which was limited over in default of appointment, gave pecuniary legacies to B. *et al.* and bequeathed the residue of her property, subject to the payment of her debts, to her sisters. A. did not mention the power, but left no other property. *Held*, that the will operated as an appointment, and that the legacies were payable out of the fund —*In re Wilkinson's Settlement Trusts*, L. R. 8 Eq. 487.

2 A. having a power of appointment among her children and the children of any deceased child, appointed by will parts to B., C and D., her children, and part to a daughter of a deceased son, E , but did not provide for three other children of E., and did not exhaust the fund. And as to all other the real or personal estate over which she had a disposing power, and all her real and personal estate and effects, she appointed, gave, demised and bequeathed the same, and every part thereof, to B. *Held*, that as A. was bound to provide for the other children of E , the residuary appointment in favor of B. was bad, and that that part of the fund went among A.'s children and grandchildren. In other respects the above dispositions

were valid.—*Bulteel* v. *Plummer*. L. R. 8 Eq. 585.

3. A. having a power of appointment in favor of children, on the marriage of his daughter B. to C., in 1832, appointed a part of the fund to her absolutely, but B.'s marriage settlement, made after the appointment, contained an ultimate limitation of the fund to A. in default of children of the marriage. A. at the same time gave his bond, *bona fide*, for a like sum to be held on like trusts, on which considerable sums had been paid. C. died without issue, and in 1841 B. married D., and a settlement was made of B.'s interest under the former one, and D. took the benefit of the same. In 1866 the trustee of the deed giving A. the power paid B.'s share to the trustee of her settlement, and D. gave the former a release. *Held*, that the reservation of a remote interest to A. was not a fraud on the power, considering A's bond; also that D. was estopped from disputing the settlement.—*Cooper* v. *Cooper*, D. R. 8 Eq. 312.

*See* COVENANT; MORTGAGE, 1; VOLUNTARY CONVEYANCE.

PRACTICE—*See* BAIL; COSTS, 4, 5; CRUELTY; INSPECTION OF DOCUMENTS; TENDER; VENIRE DE NOVO.

PRINCIPAL AND AGENT.

The steamer T. fell in with the steamer S. at sea, disabled, and the master of the T. agreed to tow the S. back to port for a certain sum In trying to do so the T. negligently ran into the S. and sunk her. The policy of insurance upon the T. and her bills of lading provided that she might assist and tow vessels in all situations. The master of the T. had never received any instructions from the owners as to performing salvage services. *Held*, that the owners of the T. were liable for the damage caused by the negligence of the master, who was acting within the general scope of his authority.—*The Thetis*,, L. R. 2 Ad. & Ec. 365.

*See* CONTRACT, 2; PRIVILEGED COMMUNICATION.

PRINCIPAL AND SURETY—*See* SET-OFF.

PRIORITY.

The tenant for life of a fund in court mortgaged his interest, and afterwards became bankrupt. After the bankruptcy, the mortgagee obtained a stop order on the dividend, which the assignee neglected to do. *Held*, that the mortgagee was entitled to priority over the assignee.—*Stuart* v. *Cockerell*, L. R. 9 Eq. 607.

PRIVILEGED COMMUNICATION.

1. Communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of, or defence against, a claim to the matter in dispute, are privileged. —*Ross* v. *Gibbs*, L. R. 8 Eq. 522.

2. Upon the question of privileged communication or not, the judge is bound to ask the jury whether the matter was published *bona fide*. If they find that it was, it is for the judge to say whether, under all the circumstances, it is or is not privileged.—*Stace* v. *Griffith*, L. R. 2 P. C. 420.

*See* SOLICITOR.

PRIVITY—*See* TRUST.

PROMISSORY NOTE—*See* BILLS AND NOTES.

PROPERTY—*See* FAMILY NAME.

PROXIMATE CAUSE—*See* NEGLIGENCE, 3.

RACE—*See* AWARD.

RAILWAY.

1. A railway company forbidden to charge more than 3*d*. per ton per mile, may charge for the whole number of miles traversed in reaching a point, although the usual and reasonable way of doing so is to go to another point and then to return part way over the same track, before going on to the destination. —*Myers* v. *London and S. W. Railway Co.*, L. R. 5 C. P. 1.

2. A covenant by a railway company with the vendor of land that a certain portion of the same should be "forever thereafter used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers travelling along the railway,' was decreed to be specifically performed, by supplying rooms, &c., and by stopping all ordinary or fast trains, other than mail, express or special trains, at said station, but with liberty to defendants to apply for a relaxation as to the latter point if stopping fewer trains would be sufficient accommodation.—*Hood* v. *North Eastern Railway Co.*, 1 L. R. 8 Eq. 666.

3. A railway company, obliged by their act to build certain works subject to a waiver by A., agreed, in consideration of the plaintiff's obtaining the waiver and conveying the land, to make a carriage road between certain points, and a wharf at the end, with proper mooring posts, the same to be sixty feet long, and of a suitable and convenient height. The consideration having been performed: *Held*, on demurrer, that specific performance of the agreement might be enforced, that it was not *ultra vires*, and that the fact that the plaintiffs contracted "on their own behalf and as representing the

inhabitants of" the district, did not make the Attorney-General a necessary party.—*Wilson* v. *Furness Railway Co.*, L. R. 9 Eq. 28.

4. Upon petition of an unpaid vendor of land who had obtained a decree against a railway company for specific performance, and declaring his lien for the balance of the purchase-money, an order was made, pending a scheme of arrangement filed by the company, for sale of the land and payment of any deficiency, with an injunction until payment against continuing in possession. Order not to be enforced until a certain day.—*Munns* v. *Isle of Wight Railway Co.*, L. R. 8 Eq. 653.

*See* Negligence, 2, 3.

Realty or Personalty—*See* Will, 2.

Receiver—*See* Annuity.

Reformation of Instruments

Insurers, after a loss, sought to reform the policy from a slip, which was signed by their agent, and from which the policy was made out with the accidental omission of a material term. The slip was not a binding contract; and the insured testified that the policy expressed their intent, and that they would not have accepted a policy other than that they got. Bill dismissed with costs.—*Mackenzie* v. *Coulson*, L. R. 8 Eq. 368.

Registration.

A., residing at Madras, in 1856 conveyed land in India to B. by deed, with covenants for further assurance. The deed was not registered under the Indian Registration Act, 1864, which provides that if such a deed be not registered, it shall not be received in evidence in any court in India. In 1866 A. mortgaged the land to C., who had notice of B.'s deed, and C. registered the mortgage under the Indian Registration Act, 1866. B. filed a bill to enforce the covenants for further assurance against C., which was dismissed.—*Hicks* v. *Powell*, L. R. 4 Ch 741.

Remainder—*See* Partition, 1.

Rent—*See* Annuity.

Res Adjudicata—*See* Award.

Resulting Trust—*See* Contract. 1.

Retrospective Law—*See* Limitations, Statute of, 2.

Revivor—*See* Costs, 3.

Revocation of Will.

A testator who died seised of certain lands subject to mortgages on which he was not personally liable, gave his personal estate for payment of his debts, and the surplus to his wife. He afterwards gave his lands to be sold to raise such sums "as my personal estate shall prove insufficient for payment of my debts, &c., and of the existing mortgages and charges upon the said" lands, and subject thereto, to his sons. *Held*, that the express bequest to the wife was not revoked by the implication of the terms of the devise.—*Kerr* v. *Baroness Clinton*, L. R 8 Eq. 462.

Right of Defence—*See* Bankruptcy, 3.

Sale.

April 14, A. made a contract, subject to the laws of the Stock Exchange (see *Grissell* v. *Bristowe*, 3 Am. L. Rev. 691), to be performed May 15, to buy fifty shares in Z Co. of B., a jobber. May 10, Z Co. stopped payment, and thereafter the directors refused to register transfers. May 16, B. nominally bought, but in fact received a bonus for taking of C. on the Stock Exchange, thirty shares, and appropriated ten to his contract with A. C. executed a transfer of these shares to A., which was delivered to A.'s brokers, and by them to A. A. also repaid his brokers, who had paid the purchase-money. C. sued A. to recover calls which C. had been forced to pay, alleging a contract by A. to purchase the shares of C., and to indemnify him against calls. *Held* (*per* Kelly, C. B. and Pigott, B.), that A. was liable on the contract alleged; (*per* Channell & Cleasby, BB. *dissentientes*), that there was no privity of contract between A. and C., whatever other remedies C. might have.—*Davis* v. *Haycock*, L. R 4 Ex. 373.

*See* Negligence, 1; Payment; Stoppage in Transitu; Vendor and Purchaser of Real Estate.

Salvage.

The plaintiff A. was temporary master of a steam tug in the place of B., and without any extraordinary exertion or peril rendered salvage services to a vessel in distress. The tug belonged to a company whose main business it was to render such services, and whose seamen were paid fixed wages and five per cent. on salvage by special agreement. A. knew that B. was employed under this agreement, but now sued for salvage independently of it. *Held*, that, as on all the facts the agreement was not inequitable, A. was bound by it.—*The Ganges*, L. R. 2 Ad. & Ec. 370.

Scienter—*See* Negligence, 1.

Separation Deed—*See* Connivance; Husband and Wife.

Set-Off.

In an action against a surety, it is a good equitable plea as to £4,606, part of the amount claimed, that a dispute as to the consideration of the promise had arisen between the plaintiff and the defendant's principal, and had been referred to arbitration in accordance with the original agreement, and that £4,606 was awarded to said principal, which before suit he offered to set off against an equal amount of the present claim.—*Murphy* v. *Glass*, L. R. 2 P. C. 408.

*See* Bond, 2.

**Settlement**—*See* Marriage Settlement.

**Ship.**

1. A cargo, through the careless stowage of the master and crew, was damaged in the course of the voyage. The bill of lading, which was not signed until after the cargo was stowed, but before the voyage commenced, contained a clause exempting the ship from liability to make good loss from, *inter alia*, "negligence or default of master or mariners' or others performing their duties." *Held*, that the ship-owner was exonerated by the above clause, which was not unreasonable, even if the owner was a common carrier.—*The Duero*, L. R. 2 Ad. & Ec. 393.

2. The payment of a fare is necessary to constitute a "passenger," whose presence on board imposes the obligation, under the Merchant Shipping Act (17 & 18 Vic. c.104, s 388), of taking a pilot.—*The Lion*, L R. 2 P.C. 525; s. c L. R. 2 Ad. & Ec. 102; 3 Am. Law Rev. 716.

*See* Bail; Bottomry Bond; Costs, 4; Damages, 2, 3; Principal and Agent; Salvage; Statute.

**Slander**—*See* Action; Privileged Communication, 2.

**Solicitor.**

When the mother of wards of the court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the post-marks.

So, in a similar case, to answer the question, "Where is she now?"—*Ramsbotham* v. *Senior*, L. R. 8 Eq. 575; 576 n. (1)

*See* Appropriation of Payments.

**Specific Performance.** — *See* Husband and Wife; Railway, 2, 3; Vendor and Purchaser of Real Estate, 2.

**Statute.**

The High Court of Admiralty has jurisdiction, under a statute giving it "over any claim for damage done by any ship," in a cause of damage instituted against a ship for personal injury.—*The Beta*, L. R. 2 P. C. 447.

*See* Annuity; Bankruptcy, 1, 2; Bond, 1; Copyright; Costs, 1, 2, 4; Damages, 2, 3; Dower; Legacy Duty; Limitations, Statute of; Railway, 1; Ship, 2.

**Statute of Frauds**—*See* Frauds, Statute of.

**Statute of Limitations**—*See* Limitations, Statute of.

**Stock Exchange**—*See* Sale.

**Stop Order**—*See* Priority.

**Stoppage in Transitu.**

A firm did business in England under the style of L. & S., and in China under that of L., S. & Co. L. & S. purchased goods for L., S. & Co., and accepted bills for the price, a long credit being given, that remittances might be made from the proceeds of sale in Hong Kong, to meet the acceptances. L. & S. then employed agents to secure tonnage in the M., and to receive the goods from the vendor and forward to Hong Kong, which was done. Before the goods or bills of lading reached Hong Kong, L., S. & Co., being insolvent, assigned to their bankers, in consideration of an antecedent debt, "the whole of their property, &c., specified, &c., with all the estate, right, title, interest, claim or demand of L., S. & Co., arising thereout or therefrom," *inter alia*, "bills of lading, &c., for all goods now on the way hither." The above bills were afterwards indorsed to the bankers, who then knew the insolvency of L., S. & Co. The vendors stopped the goods at Hong Kong. *Held*, that the *transit* was not at an end; and that an antecedent debt was not a sufficient consideration to support the transfer, and that the assignment was not to be interpreted as conveying any greater rights than the assignors had, but was made subject to the vendor's right of stoppage.—*Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393.

**Succession Duty**—*See* Legacy Duty.

**Surety**—*See* Set-Off.

**Tax**—*See* Legacy Duty.

**Telegraph.**

Plaintiff A., having ice, wrote asking B. to make an offer by telegraph. B. answered by the defendants' telegraph, "We can give you 23*s*.," &c., and paid for the message. By custom, when such offers are accepted, the cost of the message is repaid to the vendee by the vendor. By defendants' mistake, "27*s*." was sent in place of "23*s*." A. accordingly sent on the ice, which B. refused to accept at 23*s*. A. sues the telegraph company for the consequent damage. *Held*, that the action could only be maintained by reason of privity of contract, which did not subsist between A. and the defendants. One to whom a telegraphic message is sent, cannot be said to have a property in it.—*Playford* v. *United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706.

**Tenancy in Common**—*See* Partition.

**Tenant for Life and Remainder-man.**

The obligation of the tenant for life of an estate subject to encumbrances, to keep down interest on the encumbrances, exists only as between him and the remainder-man, and not as between him and the encumbrancers.—*In re Morley*, L. R. 8 Eq. 594.

*See* Appointment—Costs, 1, 2.

**Tender.**

The defendant in a cause may, by act in court, tender a sum of money in satisfaction of the plaintiff's claim, and reserve the question whether he is liable to pay costs.—*The Hickman*, L. R. 3 Ad. & Ec. 15.

An injunction was granted against the imitation of a trade-mark of linen thread, by which the thread, although not patented, was called "patent thread." it being sworn that that was the designation used on a certain class of thread by the trade, irrespective of its being patented.—*Marshall* v. *Ross*, L. R. 8 Eq. 651.

**Trust.**

1. The acceptor of a bill paid the amount to his bankers in order to meet it, but died indebted on his general balance on the day the bill matured, and the bankers dishonored it. The drawer, having been forced to pay it, brought a bill to compel the bankers to make good the amount, as having received money in trust for the purpose. *Held*, that there was no privity between the plaintiff and defendants, and the bill was dismissed.—*Hill* v. *Royds*, L. R. 8 Eq. 290.

2. A trustee, who had committed a breach of trust, died in 1847, leaving real and personal property to his widow for life, remainder to his two sons. The widow proved the will, but refused to take steps which it was her duty to take to make good the breach. She died in 1865, and her sons, who had notice of the breach of trust, took out administration to her, and received the property left by their father. *Held*, that the assets of the father, in the sons' hands, were liable to make good the breach of trust; that lapse of time was no defence; and that the father's estate was sufficiently represented in the suit.—*Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514.

*See* Appropriation of Payments; Charity; Company, 2, 3; Contract, 1; Costs, 1, 3; Equity Pleading and Practice, 1; Foreign Office; Minister; Mortgage, 1; Priority; Vendor and Purchaser of Real Estate; Will, 12, 13.

**Ultra Vires**—*See* Bank; Company, 1, 2, 3; Railway, 3; Voluntary Association.

**Vendor and Purchaser of Real Estate.**

1. At a sale by auction, the property sold was stated to contain "753 square yards, or thereabouts," whereas it contained about 578. By the conditions of sale, if any error, &c., in the particulars should be discovered, no compensation was to be allowed in respect thereof, and the right to rescind the contract was taken away. *Held*, that compensation for so large a deficiency was not excluded; and it was allowed.—*Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

2. A. agreed to buy land in fee of B., supposing him alone to own the same. In fact B. had an estate *pur autre vie*, and C., B.'s wife, the remainder in fee. D., without notice of A.'s contract, took a conveyance of said land from B. and C. *Held*, that A. was entitled to a conveyance of B.'s interest, and to compensation for C.'s interest.—*Barnes* v. *Wood*, L. R. 8 Eq. 424.

*See* Damages, 1; Railway, 3.

**Vendor's Lien**—*See* Railway, 3.

**Venire de Novo.**

After a prisoner had been tried on a good indictment, and by a competent tribunal, and had been convicted of a capital felony, and the judgment entered upon the record, the Supreme Court of New South Wales ordered a *venire de novo*, upon an affidavit that one of the jury had told the deponent that, pending the trial and before verdict, the jury had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. *Held*, that in a case of felony, like the above, the court could not grant a *venire de novo*, and that if they could, the evidence did not justify their doing so.—*The Queen* v. *Murphy*, L. R. 2 P. C. 535.

**Voluntary Association.**

A court of law will not interfere with the rules of a voluntary association, unless to protect some civil right or interest which is said to be infringed by their operation. On this principle, a civil suit by a clergyman of the Scotch Episcopal Church, to set aside certain canons passed by a general synod in 1863, and now alleged to be *ultra vires*, was dismissed, no damage being proved to the court to have accrued.—*Forbes* v. *Eden*, L.R. 1 H.L. Sc. 568.

*See* Minister.

**Voluntary Conveyance.**

A married woman of middle age and infirm health appointed the bulk of her property in favor of a volunteer, by a deed which was drawn by his solicitor at his costs, and which reserved no power of revocation. It was sworn that she was told that the deed was irrevocable, but her subsequent acts indicated that she was not aware of the fact. *Held*, that the deed must be cancelled. Where under such circumstances the volunteer's solicitor is employed, it is his duty to insist upon the insertion of a power of revocation The want of one is a strong ground for setting aside the deed.—*Coutts* v. *Acworth*, L. R. 8 Eq. 558.

Ward of Court—*See* Solicitor.

Watercourse—*See* Fishery.

Way—*See* Dedication.

Will.

1. A codicil concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." The wife elected against the codicil, whereupon it was not included in the probate. —*Goods of Smith*, L. R. 1 P. & D. 717.

2. A testator gave real and personal estate to A., charged with the payment of annuities to the testator's six children, "or their heirs respectively." One of the children was dead at the date of the will. *Held*, that her statutory next of kin were entitled. The annuity was personal estate. —*Parsons* v. *Parsons*, L. R. 8 Eq. 260.

8. A testator left a residue to trustees, to collect, &c., and then to divide the whole among his four children, A, B, C. and D., "with benefit of survivorship in case any of them should die without issue;" and if any of them should die leaving children, the share of him so dying to go to such children. A., B., C. and D all survived the testator. *Held*, that they took indefeasible interests. Dying in the lifetime of the testator was meant.—*Bowers* v. *Bowers*. L. R. 8 Eq. 288.

4. A testator gave a residue to trustees to assign, &c., to, &c., such child or children of M. as should be living at testator's decease, to be equally divided among them, if more than one, when they should attain the age of twenty-one, and if there should be but one who should attain the age of twenty-one, then the whole to such child. The trustees had a power of maintenance during the minority of the children, and during the suspense of absolute vesting were to accumulate the rest of the income for the benefit of the persons who should become entitled to the principal. *Held*, that no child of M. who did not attain twenty-one could take a vested interest.—*Merry* v. *Hill*, L. R. 8 Eq. 619.

5. Testator bequeathed a legacy to his first cousins, to be equally divided between them. The shares of those "who may die in my lifetime, unto all and every the children of all my first cousins who may so die in my lifetime, share and share alike, such shares to be taken *per capita* and not *per stirpes*." *Held*, that the children of a first cousin, who had died before the date of the will, took nothing by the legacy.—*In re Hotchkiss's Trusts*, L. R. 8 Eq. 643.

6. A testator directed his executors, after the death of his wife, A., to invest one-sixth of a residue in an annuity during the life of B. for his support; and in case B. should anticipate, assign, charge or encumber the annuity, or become a bankrupt or insolvent, the annuity was to go to the other residuary legatees. B. died in A.'s lifetime, without having assigned &c., or become bankrupt, &c. *Held*, that the gift to B. failed, and that that one-sixth was undisposed of at A.'s death.—*Power* v. *Hayne*, L. R. 8 Eq. 262.

7. A testator made a gift of "all my ready money, bank and other shares, freehold property, . . . . and any other property that I may now possess." *Held*, that personal property acquired after the date of the will passed by the bequest.—*Wagstaff* v. *Wagstaff*, L. R. 8 Eq. 229.

8. A testator holding three messuages in X. by separate leases, and two more in X. and one in Z by one lease, bequeathed his "*four* leasehold messuages in X.," with other tenements in trust out of the rents to pay the ground-rents of the same and of that in Z, and to pay over the surplus. *Held*, that the five messuages passed.—*Sampson* v. *Sampson*, L. R. 8 Eq 479.

9 A., an executor, was entitled to residue X., subject to a legacy to B. in trust for C. No sum was appropriated to the legacy, but A. paid interest on it. B. had, however, invested part of X on mortgage in his own name, with A.'s assent. A. died, leaving a bequest of "all my money and securities for money of every description" *Held*, that B.'s investment did not pass; neither did bank stock nor canal shares; but a part of X. remaining invested on mortgage, in the name of A.'s testatrix, did.—*Ogle* v. *Knipe*, L. R. 8 Eq 434.

10 A. borrowed part of a fund which was settled on him absolutely, subject to a life-estate in his wife if she survived him, and mortgaged his Z. estate for its repayment.

A. afterwards devised Z. to his wife for life, remainder to B. in fee. A. also bequeaths "all and every the . . . sums of money . . . upon government or real securities which I shall die possessed of, or in anywise entitled to," in trust for his wife for life, remainder to B. for life, remainder to B.'s wife for life, remainder to B.'s children absolutely. There was also a residuary clause. A. died before his wife. *Held*, that the mortgage debt did not merge in the Z. estate, and that A.'s interest in said fund passed by the specific bequest.—*Wilkes* v. *Collin*, L. R. 8 Eq. 888.

11. A testator gave property in trust to pay annuities, &c., and subject thereto to the "sole use of my daughter H. and her assigns." H. was unmarried, and a devise to a married daughter was expressed in words apt to create a trust for her separate use. There were further gifts to H., which clearly did not exclude the marital right. H. afterwards married. *Held*, that "sole" did not mean free from the control of any husband. "Sole," in a will, without the word "separate," has not a technical meaning, unless the rest of the will furnishes evidence of that intent.—*Massy* v. *Rowen*, L. R. 4 H. L. 288.

12. A Frenchman left all his property to A., B. and C., his executors, in trust to sell, and the moneys arising from the said sale, &c. . . . after payment of . . . debts [and other expenses], shall be paid by my said trustees, and I hereby give and bequeath the same to D. absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." Testator had, before the date of the will, told D. (to whom he was engaged) his wishes, and repeated them after the date of the will, and D. wrote them down on a paper not shown to him. *Held*, that D. took the fund beneficially, subject to the performance of the above wishes. Parol evidence of an intent to make a beneficial gift to D. excluded.—*Irvine* v. *Sullivan*, L. R. 8 Eq. 678.

18. A testator, in 1841, gave lands to Sidney Sussex College, Cambridge, and Trinity College, Oxford, for the only use of education in piety and learning, of ten descendants of the brothers and sisters of the testator, and of his two wives, and in default of such to their poor kindred. An intention to benefit the colleges appeared. *Held*, upon the construction of the will, confirmed by the unvarying usage of the two colleges, that the descendants claiming the benefit by the gift, must be educated at one of the colleges, as members, and that, subject to that trust, the colleges were entitled to the lands in equal moieties.—*Attorney-General* v. *Sidney Sussex College*, L. R. 4 Ch. 722.

*See* APPORTIONMENT; CHARITY; CONTRIBUTION; COVENANT; DOWER; LEGACY; MORTMAIN; POWER, 1, 2; REVOCATION OF WILL.

WINDING UP.

A creditor of a company who holds its acceptances for his debt, and also its debentures as collateral security, cannot prove for more than the amount of his debt when the company is winding up.—*In re Blakely Ordnance Co.*, L. R. 8 Eq. 244.

*See* PAYMENT.

WITNESS—*See* COMMISSION.

WORDS.

"*Aggrieved.*"—See COPYRIGHT.
"*Beer-house.*"—See BEER-HOUSE.
"*Contracting a debt.*"—See BANKRUPTCY, 2.
"*Damage.*"—See STATUTE.
"*Investing in securities.*"—See COMPANY, 2.
"*Leakage.*"—See BILL OF LADING.
"*Money and securities for money.*"—See WILL, 9.
"*Other heirs.*"—See WILL, 2.
"*Patent thread.*"—See TRADE-MARK.
"*Property I now possess.*"—See WILL, 7.
"*Sole.*"—See WILL, 11.
"*Sums which I shall die entitled to.*"—See WILL, 10.
"*With benefit of survivorship.*"—See WILL, 8.

## REVIEWS.

THE HISTORY OF LAW OF TENURES OF LAND IN ENGLAND AND IRELAND, WITH PARTICULAR REFERENCE TO INHERITABLE TENANCY, LEASEHOLD TENURE, TENANCY AT WILL, AND TENANT RIGHT: By W. H. Finlason, Esq., Barrister at-law: Editor of Reeves' History of English Law. London: Stevens and Haynes, Law Publishers, Bell Yard, Temple Bar, 1870.

In every page of this work we recognise the exhaustive industry of Mr. Finlason, shewing his capacity for immense research and endless labour. His work is described as a History of the Law of Tenures of Land in England and Ireland. He well observes at the conclusion of the work, that the history of law involves far more than a mere account of the laws that have been actually passed; that its most important province is, to disclose the causes that lead to changes in the law. Fully appreciating his own conception of what the history of law should be, no exertion on his part has been spared to make his history what every history of law should be, a full, clear, and comprehensive account of the several changes in the law, and the causes which from time to time produced and made necessary the changes.

The relation of landlord and tenant has, in all civilized countries, been a subject of much nicety, and much difficulty; and, in no country have the changes been so slow as in Ireland. While in England great and permanent changes were made in obedience to the demands of progressive civilization, Ireland was comparatively inert. Any system which fails to give the tenant a certain interest in the soil which he cultivates is a barbarous system. The only way to secure the energy, stimulate the industry, and secure the goodwill of the tenant, is to give him a secure tenure of his land, or a sure hope of payment for his improvements when his tenure ceases. Some effort has been made in this direction in the north of Ireland, by means of what is there known as Tenant Right. But this right has not the positive obligation of law, resting rather on the good nature of the landlord than any actual right of the tenant as against the landlord. Besides, it is not uniform; in some counties, while it is equal to twenty years' purchase, in others it is not more than five.

The sales of estates by the Encumbered Estate Commissions, though it has been of great benefit in many ways, has not improved the condition of Irish tenants as a class. Some few tenants have themselves become owners of the land. But, in many cases the new landlords have purchased for profit, and in a hard commercial spirit refuse to do more than compelled by positive law, and where not restrained by law do not scruple to take possession of improvements made by tenants without payment or compensation of any kind. It may be said, why not leave parties to make their own contracts, and why not allow these matters of detail to be regulated by contract? But the land tenure in Ireland is a question too complicated to be disposed of in the brief space we can now devote to it. The landlords as a class are rich and powerful, the tenants poor and weak. Many of the landlords are absentees, and care little for the land except for the revenue which it yields. Most of the tenants love the land, and hate to pay rent, looking upon landlords as their natural enemies, living in the past, and holding fast the traditions of the cruel injustice of a by-gone age.

Mr. Finlason, by shewing what the law of England is as to tenures, shows, what in his opinion the law of Ireland ought to be. It is not, however, to be forgotten, that there is more than mere tenure involved in "the Irish land question." The bulk of the land in Ireland is not only in the hands of a few persons as in England, but, while the majority of the landholders in Ireland are Protestants, the majority of the tenants are Roman Catholics, and there is an antagonism of creed more bitter than any antagonism of race, and worse still, the Roman Catholic tenants in many parts look upon their Protestant landlords as the descendants of conquerors and oppressors. The traditional feeling of hatred that in some parts of Ireland is found to exist, makes the land question one of peculiar difficulty. Statesmen for more than half a century have endeavoured to supply a remedy, but no efficient remedy has yet been discovered, and perhaps time alone can remedy the evil. But this is no reason why attempts should not be made to lessen the discontent by removing as much as possible some of the causes of it. One cause no doubt is the uncertainty of tenure, and this operates almost as injuriously upon the landlords as the tenants. While the tenants prosper the landlords prosper. While the tenant suffers the land suffers, and through impoverished land the landlord suffers. Land well farmed is worth more rent than land ill farmed, and a tenant who farms well is better able to pay his rent than a tenant who is unable to farm well, or unwilling because discouraged, knowing, that he is simply by his labour improving the property of another without benefitting himself.

It is to be hoped that the present government may do something for the relief of Ireland on the land question. The perusal of the work before us by any statesman, will give him a better idea of what is needed than any work of the kind that we have seen. The author in his introduction, shews the differences between the tenure of land in England and in Ireland, and the causes of the differences. His first chapter is devoted to a general history of tenure in England, and especially of inheritable tenure. His second chapter, is the history of leasehold tenure in England. His third chapter is the history of the yearly tenancy in England; and his fourth and last chapter, which is the most extensive in the volume, is the history of the land tenure in Ireland. Each page has its foot notes, giving in detail the authorities for the propositions stated in the text.

We have read the book with great interest, and look upon it as a valuable book of reference, both for the lawyer and the legislator. The author is not a mere theorizer, but a matter of fact writer. He does not aim so much to entertain as to instruct; and, no man can read his book without deriving instruction which nowhere else can be found in form so convenient, and in substance so reliable. The typography of the book is elegant. It adds much to the pleasure of reading a book to find it printed in good type and on good paper. The name of the well known law publishers on the title page (Messrs. Stevens and Haynes), is a guarantee that the last mentioned qualities will be found in any book of which they are the publishers.

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Harrison's Common Law Procedure Act and other Acts relating to Practice and the Rules of Court, with explanatory Notes, &c. Second Edition. Copp, Clark & Co., Toronto.

Part V. completes the Common Law Procedure Act proper. We then have the Act respecting Writs of Mandamus and Injunction, originally a part of the Common Law Procedure Act of 1856. The text is explained by numerous lengthy and excellent notes, and a vast collection of cases.

This number concludes with the commencement of the Act respecting absconding debtors, also originally a part of the Common Law Procedure Act, and though, as the Editor remarks, not so much in use as it was before, the Insolvent Act of 1864 is nevertheless not obsolete, and is properly reproduced with its appropriate notes.

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The Law Magazine and Law Review. May, 1870. London: Butterworths, 7 Fleet St.

This number opens with an article on the subject of the Civil Code of New York, to which writers in England have paid much more attention than its intrinsic merits warranted, but this is in accordance with the usual desire of Englishmen to praise everything that emanates from a country which dislikes and despises England in an equal ratio to the amount of senseless adulation that the latter on every conceivable occasion bestows on everything American.

The writer, however, in the *Review* before us, has the audacity to prefer something Colonial in the shape of codes—giving the palm to the Indian code in preference to that of New York. It thus concludes its remarks on the latter:

> "In conclusion we can only express our deliberate opinion as to the merits of the Code. It is this. The Civil Code of New York is in a high degree meagre, ambiguous, and inaccurate. It has not yet received the sanction of the Legislature. Should it ever do so, it may be useful to students as an elementary text-book. It may also be of service to laymen desiring to obtain some notion of the general principles of the law. To the practitioner it will, except so far as t effects alterations in the exisisting law, be absolutely useless. So far as it alters the existing law, it will, from its meagreness and imperfections, be productive of extensive litigation, and will require to be wrought into shape by a vast amount of judicial interpretation."

The next article discusses the distinction between The Law Military and Martial Law. Then there is rather a lengthy notice of the diary of a Barrister, which gives some pleasant reading for a spare half hour. The speech of Hon. W. B. Lawrence on the Marriage Laws of various countries as affecting the property of married women, delivered at the British Congress of the Social Science Association in October last, is interesting and useful for reference. We commend it to the champion of women's rights in the West, the enterprising Editress of the *Chicago Legal News.*

Mr. Justice Hayes, lately one of the Judges of the Queen's Bench in England, and whose sudden death last November was much deplored, is highly spoken of in the next article. He is described as a deeply read lawyer, with an acute intellect and subtle mind, as well as a man of great and varied accomplishments, and in social life a universal favorite. Some of our readers may have heard of the celebrated case of the "Dog and the Cock," descriptive of a trial where a country jury acquitted a prisoner who was found with a newly killed fowl in his possession, on the suggestion of an ingenious counsel that a dog, whom no witness had seen or heard—but as to whom "there might have been a dog although you didn't see it"—had worried the fowl, that the prisoner had come up and rescued the fowl, wrung its neck to put it out of pain, and put it in his pocket "just to give the prosecutor;" it is said that a song written upon this by Mr. Hays', and occasionally sung by himself, was a thing never forgotten by those who heard it.

There are also articles on Friendly Societies —A M. S. of Vacarius—Church Patronage in England and Scotland—The Lord Chancellor's Judicature Bills, &c.

The Law Times and Law Times Reports. 10 Wellington St., Strand, London, W. C.

The Solicitors' Journal and Weekly Reporter. 59 Carey Street. Lincoln's Inn. London, W. C.

The Law Journal. 5 Quality Court, Chancery Lane, Holborn, London.

These standard periodicals make their welcome weekly appearance with regularity. They seem to vie with each other in giving their readers, in their different styles, the legal news of the world and the professional chit-chat of the empire. The two former discuss at greater length the leading cases decided from time to time, thereby giving much light and assistance in reading the reports.

The Lower Canada Jurist. John Lovell, Montreal.

This collection of decisions in the Province of Quebec is published monthly, under the editorial management of a committee composed of the following gentlemen of the profession: S. Bethune, Q.C., P. R. Lefrenaye, J. L. Morris, and James Kerby.

It is not often, for obvious reasons, that cases in that Province can afford us much assistance, but we have from time to time noticed the decisions that have any bearing upon our law.

We also acknowledge,

Bench and Bar. Chicago.

American Law Register.

Chicago Legal News, and a pamphlet by the Editress, entitled, "A Woman cannot practice Law or hold any Office in Illinois."

The Scientific American. Excellent as usual in its particular line.

The Canadian Illustrated News. Geo. E. Desbarats, Montreal.

We trust the enterprise of the publisher will be duly appreciated. The difficulties lying in the path of those who undertake the publication of an illustrated paper are immense, and we excuse defects in some particulars in appreciation of its excellence, under the circumstances, as a whole.

The Legal Gazette. Philadelphia.

The Legal Intelligencer, &c.

The European Mail, &c.

Lately in London Samuel Chas. Boulter, aged seventeen, living at 17, Clifton St., was charged before Alderman Gibbons with counselling a pressman, in the service of Messrs. Eyre and Spottiswood, printers, to commit a felony, by inciting him to steal an examination paper belonging to the Incorporated Law Society. It appeared that the prisoner was an intending candidate for the preliminary examination held this week at the Law Institute. He stated (we copy the *Times* report) that he had been ill-advised, and he hoped he would be dealt with leniently. Alderman Gibbons said the prisoner had very improperly tried to get information before the time when it would be given to him. Looking at his age, and the serious consequences that imprisonment would be to him, he would not send him to prison, but bind him over, in his own recognizances in £20 to appear if called upon.

The storekeeper of the printers said it was not their wish that the prisoner should be severely dealt with, but they were compelled to take these steps against him because their workpeople were so frequently tempted by candidates to get proofs of the questions for examination. Messrs. Eyre & Spottiswoode deserve credit for bringing this offender forward. The chance of a candidate slipping through an examination which he was really incompetent to pass is as nothing compared with that of a person being admitted to the responsibility and status of a solicitor, who could be guilty of so dishonourable an act as to attempt surreptitiously to anticipate examination questions. Is it possible that the storekeeper of Messrs. Eyre and Spottiswoode was correct in stating that such dishonourable attempts are *frequently* made?—*Solicitor's Journal.*

## APPOINTMENTS TO OFFICE.

### ADMINISTRATOR OF THE GOVERNMENT.

THE HON. EDWARD KENNY, a Member of the Queen's Privy Council for Canada, to be Administrator of the Government of the Province of Nova Scotia, and to execute the office and functions of Lieut-Governor during the absence of Lieut-General Sir Charles Hastings Doyle, the Lieut-Governor of the said Province. (Gazetted May 18, 1870.)

### JUDGE—SUPERIOR COURT—QUEBEC.

LOUIS EDWARD NEPOLEON CASAULT, of the City of Quebec, in the Province of Quebec, Esq , one of Her Majesty's Counsel, learned in the Law, to be a Puisne Judge of the Superior Court, for Lower Canada, now the Province of Quebec, in the room and place of the Hon. Felix Adilon Gauthier, resigned. (Gazetted May 27, 1870.)

### NOTARY PUBLIC.

CHARLES E. HAMILTON, of the Town of St. Catharines, Esq., Barrister-at-law. (Gazetted May, 21, 1870.)

## DIARY FOR JULY.

| | | |
|---|---|---|
| 1. | Frid. | Dominion Day. Long Vacation begins. Last day for County Treasurer finally to examine assessment rolls, &c. |
| 3. | SUN. | *3rd Sunday after Trinity.* |
| 4. | Mon. | County Court (except York) Term begins. Heir and Devisee sittings commence. Last day for notice of trial for County Court York. |
| 9. | Sat.. | County Court Term ends. |
| 10. | SUN. | *4th Sunday after Trinity.* |
| 12. | Tues. | General Sess. and County Court sittings York. |
| 17. | SUN. | *5th Sunday after Trinity.* |
| 19. | Tues. | Heir and Devisee sittings end. |
| 22. | Frid. | *St. Mary Magdalene.* |
| 24. | SUN. | *6th Sunday after Trinity.* |
| 25. | Mon. | *St. James.* |
| 31. | SUN. | *7th Sunday after Trinity.* |

THE

# Canada Law Journal.

JULY, 1870.

## LEX LOCI CONTRACTUS—LEX FORI.

By D. Girouard, Esq., *Advocate, Montreal.*

(*Continued from page* 144.)

And now on what grounds are based the objections to the *lex fori?*

Bateman (*Commercial Law*, p. 106, s. 148, *et seq.*) after admitting it to be well settled that that the plea of limitations is a plea to the remedy, and consequently is governed by the *lex fori*, makes this argument: "What is the essential or necessary difference between a discharge of the obligation of the contract, and a bar of the remedy upon it? In what manner are they related to each other? It is of the essence of the obligation that it shall be enforced; of moral obligation that it shall be enforced by moral means; of legal or civil obligation that it shall be enforced by such means as are given to courts of justice for that purpose. The exact relation of the obligation and the remedy to enforce it, then is that of an end to be attained and the means of attaining it; not that of an end to be attained, and the means of preventing its attainment."

Granting this to be so, as to the country where the contract is made; is it hence to be inferred that every other country is bound to do likewise, even in opposition to its laws of public order and policy?

The maxim of the Roman Law was *Interest reipublicæ ut sit finis litium*, and it has been recognized by the jurisprudence of modern nations.

"Les prescriptions," observes Domat, liv. 1, tit. 7, sect. 4, § 2 (Rémy's ed., p. 211), "ont été établies pour le bien public," and elsewhere he says, "afin de mettre en repos ceux qu'on voudrait inquiéter."—See also Pothier, *Obligations*, Nos. 676, 678; Broom's Legal Maxims, Am. ed. 1864, p. 600 *et seq.*

Blackstone, vol. 3, p. 307, says: "The use of these statutes of limitation is to preserve the peace of the kingdom." "They go," says Story (*Conflict of Laws*, ch. 14, § 576), "*ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects, or by or against foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs, arising from the ambiguity and obscurity, or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper forum within the prescribed period. They take away all solid grounds of complaint; because they rest upon the negligence or *laches* of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times, which are unexplained, and have now from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal, while men are mortal: *Ne autem lites immortales essent, dum litigantes mortales sunt.*"

Again (§ 578): "but if the question were entirely new, it would be difficult upon principles of international justice or policy to establish a different rule. Every nation must have a right to settle for itself the times, modes and circumstances, within and under which suits shall be litigated in its own Courts. There can be no pretence to say that foreigners are entitled to crowd the tribunals of any nation with suits of their own, which are stale and antiquated, to the exclusion of the common administration of justice between its own subjects. As little right can foreigners have to insist, that the times and modes of proceeding in suits, provided by the laws of their own country, shall supersede those of the nation in which they have chosen to litigate their controversies, or in whose tribunals they are properly parties to any suit."

"A person," said Lord Tenterden, in *De La Vega* v. *Vianna*, "suing in this country must take the law as he finds it; he cannot by virtue of any regulation of his own country enjoy greater advantages than other suitors, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

Troplong and Massé urge that the *laches* of the creditor to sue must be considered as existing at the place of payment, and consequently must be dealt with according to the law of that place.

"La raison en est simple," says Troplong, No. 38, "la prescription afin de se libérer est, en quelque sorte, la peine de la négligence du créancier. Or, dans quel lieu le créncier se rend-il coupable de cette faute? C'est évidemment dans le lieu où il doit recevoir son paiement. Donc il encourt la peine établie dans ce lieu: donc la prescription qu'il doit subir se règle par la loi du même lieu."

"Ainsi," Marcadé replies (sect. 6, p. 12), "soit une dette contractée par un Piémontais domicilié à Turin envers un Français domicilié à Paris, mais avec convention que le remboursement sera fait à Rome (où d'ailleurs il faut supposer qu'il n'a pas été fait élection de domicile par le débiteur, puisqu'alors la question n'existerait plus, Rome devenant ainsi le lieu du domicile); c'est d'après la loi de Rome, quoique le débiteur n'y eut pas de domicile, que la dette se prescrire, et la raison en est simple, dit M Troplong, puisque *c' est à Rome que le créancier a été négligent!* . . . Comment! cet homme *qui n'a jamais quitté Paris*, vous me dites que pendant quinze ans, vingt ans ou plus, *il a été négligent* à Rome! C' est à Rome qu'il est resté dans cette longue inaction, à Rome qu'il s'est endormi dans cette insouciance prolongée, à Rome, *lui qui n'y a jamais* mis le pied! . . . . . Il faut donc ici encore, comme au No, IV., rappeler à M. Troplong que *priùs est esse quàm esse tale*, et que pour avoir été n'importe quoi à Rome, pour y avoir été négligent ou soigneux, insouciant ou vigilant, pour y avoir été tout ce qu'on voudra, il faut tout d'abord avoir été à Rome . . . . Qu'on nous dise que ce créancier a négligé son affaire *de Rome*, à la bonne heure: mais cette affaire de Rome où l'a-t-il négligée? C' est à Paris."

Mr. Westlake modestly says that Lord Brougham's opinion in *Lippman* v. *Don*, rests on two fallacies:—

"First, 'the argument that the limitation is of the nature of the contract, suppose that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition.' But this is to confound the interpretation of the contract with the operation on it of the *lex loci contractus*. . . . . Secondly, 'it is said that by the law of Scotland'—the *lex fori*, which it was proposed to apply as governing the remedy—'not the remedy alone is taken away, but the debt itself is extinguished. . . . I do not read the statute in that manner. . . . The debt is still supposed to be existing and owing.' There is, however, little or no meaning in saying that a debt subsists that cannot be recovered."

As to the first of Mr. Westlake's objections, it would perhaps be sufficient to remark, that Lord Brougham referred merely to the intent of the parties, irrespective of the operation of the law upon their contract. The question, moreover, is not the effect or operation of the *lex loci contractus*, but of the *lex fori*; and if the contracting parties contemplated a breach of the contract, and a suit upon the same, they must have had reference to the law of the place where that suit would be brought, or for everything relating to that suit. But, as the noble jurist observes, and his observations are a complete answer to the remarks of Chief Justice Cockburn:

"Nothing can be more violent than that supposition that the breach of the contract is in the contemplation of the parties, and indeed nothing more contrary to good faith. It is supposing that when men bind themselves to do a certain thing, they are contemplating not doing it, and considering how the law will help them in the non-performance of a duty. If the law of any country were to proceed upon the assumption that contracting parties have an eye to the period of limitation, and only bind themselves during that period, it would be sanctioning a faithless course of conduct, and turning the provisions which have been made for quieting possession after great *laches* on the part of the creditors, and possible destruction or loss of evidence, into covers for fraudulent evasion on the part of debtors."

In the second place, Mr. Westlake cannot discern a distinction between a debt that cannot be recovered *en justice*, and a debt extinguished *in se*. There is a wide difference between the two. 1. It is well known that a debt extinct *in se* is not susceptible of payment, and the action *condictio indebiti* would then lie. But a debt declared prescribed may be paid, without danger of such an action; 2.

In a case like the present one, the debtor is still liable to an action in the country where the contract was made or is payable. These characteristics of a debt which is prescribed are so plain that we need not be called on to quote any authority, and they clearly show that prescription does not affect the contract, but the remedy.

This rule is distinctly laid down in all the books, and should be applied in cases of conflict of prescription. The Civil Code of Lower Canada, art. 2188, states the old law to be that "extinctive or negative prescription is a bar to the action;" and the same principle is held by all the American and English jurists, and likewise by the French commentators:

"La loi," observes Merlin, "qui déclare une dette prescrite, n'anéantit pas le droit du créancier en soi: elle ne fait qu'opposer une barriére à ses poursuites." Even Bullenois (Observ. 28, vol. 1, p. 530) properly remarks: "L'exception ne tombe que sur l'action et la procédure intentée." "Puisque," says Marcadé, "la prescription n'anéantit pas le droit du créancier par-elle-même et *ipso facto*, mais procure seulement au débiteur une exception qu'il lui sera facultatif d'opposer à l'action, c'est donc par la loi du lieu où ce débiteur doit être actionné, c'est-à-dire du lieu de son domicile, que la prescription doit tout naturellement se régler. Il n'importe pas qu'un autre lieu soit désigné pour le paiement, où ait été celui de la passation du contrat; car selon la pensée d'Huberus, la chose capitale à considérer, la chose à laquelle la prescription se rattache intimement, puisqu'elle vient en opérer l'extinction, c'est l'action et non pas telle ou telle circonsantce de la convention: *jus ad actionem pertinent, non ad negotium gestum.*

The Court cannot supply a plea of prescription; it is personal to the defendant; and hence it must be ruled by the law of the place where he is served with process. "La prescription," says even Pardessus, "étant une exception qu'il est permis au débiteur d'opposer à la demande de son créancier, c'est naturellement dans sa propre législation qu'il doit trouver ce secours." (Félix, vol. 1, p. 221.)

In opposition to this plain, intelligible doctrine, Savigny, Massé and Westlake insist upon this other reason: that the *lex loci contractus* is the most reasonable rule, "because it excludes both the arbitrary power of the plaintiff to choose between competing forums that which allows the longest term of prescription, and the arbitrary power of the defendant to defeat his creditor by removing his domicile to the forum which allows the shortest term, and avoiding, while it runs, personal presence in the special forum of the obligation."

Massé calls the result of such uncertainty, *une conséquence déplorable.* But it is, certainly, more imaginary than real. No man can presume that when one removes from one country to another, his aim is to defeat his creditor by acquiring a shorter term of prescription. As to the arbitrary power of the plaintiff to choose between competing forums, it is certainly not a hardship to him, and with regard to the debtor, it suffices to remark that he is the best judge of his own interest, and to add with Story, s. 579, that "if he choose to remove to any particular territory, he must know that he becomes subject to the laws of that territory, as to all suits brought by or against him."

If, however, inconvenience can be urged as grounds of reasoning, I will merely state that if the *lex loci contractus* should be the rule in one country, for instance in Lower Canada, its citizens would be placed at a great disadvantage as regards their neighbours. In Ontario and in most of the bordering States, prescription in commercial matters is of six years, and we may at once suppose the case of a Lower Canadian removing to any of those countries, immediately after his liability on negotiable paper is terminated here by a prescription of five years. He would, therefore, notwithstanding his discharge here, remain liable to an action there, where the *lex fori* is the exclusive rule. This would be a more *déplorable conséquence* than that pointed out by Massé and others: it would be nothing less than a public inconvenience, and would be contrary to the policy of any commercial nation.

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We learn with much pleasure that Mr. Gowan, Judge of the County Court of the county of Simcoe, and Chairman of the Board of County Judges, is about to take a trip to England and the Continent for the benefit of his health, having been granted a long leave for that purpose should he require it.

If ever a man earned a holiday Judge Gowan has; for twenty-seven years he has been unremitting in the discharge of his judicial duties, and we believe we are correct in saying that the whole extent of his leave during that long period, except on official business, has scarcely exceeded in all four months. The members of the Bar and the officials of the County, on hearing of his intended departure, presented him with a farewell address conveying their feelings of respect and wishes for his future welfare. The Board of Public Instruction for the County also passed a resolution to the same effect.

We desire to join with his numerous other friends in wishing him a pleasant and beneficial voyage and a safe return.

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The Court of Queen's Bench will sit on Monday, the 19th September next, at two o'clock, P. M., to give judgment in cases standing before them, and for the purpose of attending to such other business as the Court in its discretion may see fit to entertain. The Court of Common Pleas will not meet before Michaelmas Term.

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A Judge in one of the Courts in the United States thus speaks of the folly of unnecessarily multiplying legal objections:—

> **"We have in this case twenty-six errors assigned to a single case of ordinary length, which is as much as to say the judge did not open his mouth unless to commit an error. This skill at multiplication is accomplished by dividing the charge into short paragraphs, and assigning error to each. The injustice of thus manipulating a charge by piecemeal is obvious; while a still more serious injury is done to the cause, by indiscriminate allegations of error and useless discussion. They distract our minds by diverting them to consider matters of no moment, and weaken the strong points, if any, by heaping upon them those that are feeble. Upon a writ of error it is much better to consider well the positions, which seem to be fairly tenable, and to present them alone. Then the argument spends its concentrated force upon that which commands consideration, and the attention of the judges is not diverted to that which is immaterial. In this way real error is apt to be detected, while in the other, the mind, wearied by unimportant exceptions and inconclusive discussion, is more likely to overlook material errors. We commend these remarks to those who practise before us."**

## AN ACT

### *To amend the Act imposing Duties on Promissory Notes and Bills of Exchange.*

[Assented to 12th May, 1870.]

Whereas, it is expedient to repeal Sections Eleven and Twelve of the Act passed in the thirty-first year of Her Majesty's reign, chapter nine; therefore, &c.

1. The said sections are hereby repealed, and the following Sections substituted therefor:—

"11. If any person in Canada makes, draws, accepts, indorses, signs, becomes a party to, or pays any Promissory Note, Draft, or Bill of Exchange, chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid, by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of one hundred dollars, and, save only in the case of payment of double duty, as in the next section provided, such instrument shall be invalid and of no effect in law or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect; and in suing for any such penalty, the fact that no part of the signature of the party charged with neglecting to affix the proper stamp or stamps, is written over the stamp or stamps affixed to any such instrument, or that no date, or a date that does not correspond with the time when the duty ought to have been paid, is written or marked on the stamp or stamps, shall be *primâ facie* evidence that such party did not affix it or them, as required by this Act: but no party to, or holder of any such instrument, shall incur any penalty by reason of the duty thereon not having been paid at the proper time, and by the proper party or parties, provided at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double or additional duty as in the next section provided, as soon as he acquires such knowledge."

"12. Any subsequent party to such instrument or person paying the same, or any holder without becoming a party thereto, may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his signature, or part thereof, or his initials, or the proper date, on such stamp or stamps, in the manner and for the purposes mentioned in the fourth Section of this Act; and when upon the trial of any issue, or on any legal inquiry, the validity of any Promissory Note, Draft or Bill of Exchange is questioned by reason of the proper duty thereon not having been paid, or not having been paid by the proper party, or at the proper time, and it appears that the holder thereof, when he became holder, had no knowledge that the proper duty had not been paid by the proper party, or at the proper time, such instrument shall, nevertheless, be held to be legal and valid, if it shall appear that the holder thereof paid double duty as in this section mentioned, so soon as such holder acquired such knowledge, or if the holder thereof, acquiring such knowledge at the trial or inquiry, do thereupon forthwith pay such double duty; or if the validity of such Promissory Note, Draft, or Bill of Exchange is questioned by reason of a part only of the requisite duty thereon having been paid at the proper time or by the proper party, and it appears to the satisfaction of the Court or Judge, as the case may be, that it was through mere inadvertence or mistake, and without any intention to violate the law on the part of the holder, that the whole amount of duty, or double duty, as the case may be, was not paid at the proper time, or by the proper party, such instrument, and any endorsement or transfer thereof, shall, nevertheless, be held legal and valid, if the holder shall, before action brought, have paid double duty thereon, as in this section mentioned, as soon as he reasonably could, after having become aware of such error or mistake; but no party, who ought to have paid duty thereon, shall be released from the penalty by him incurred as aforesaid."

2. This Act shall not apply to any suit pending when it comes into force.

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## AN ACT

### *To amend the Act respecting the Duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders.*

[Assented to 12th May, 1870.]

Whereas, it is expedient to amend Sections sixty-five and seventy-one of the Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders; therefore, &c.

1. Section sixty-five of the said Act is hereby repealed, and the following section substituted:

"65. Unless it be otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice or Justices of the Peace, any person who thinks himself aggrieved by any such conviction or order, may appeal in the Province of Quebec or Ontario, to the next Court of General or Quarter Sessions of the Peace; or in the Province of Quebec, to any other Court for the time being discharging the functions of such Court of General or Quarter Sessions of the Peace in and for any district therein; in the Province of Nova Scotia, to the Supreme Court in the county where the cause of information or complaint has arisen; and in the Province of New Brunswick, to the County Court of the County where the cause of the information or complaint has arisen: such right of appeal shall be subject to the conditions following:

"1. If the conviction or order be made more than twelve days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction, or order, be made within twelve days of the sittings of such court then to the second sittings next after such conviction or order;

"2. The person aggrieved shall give to the prosecutor or complainant, or to the convicting Justice or one of the convicting Justices, for him, a notice in writing of such appeal, within four days after such conviction or order;

"3. The person aggrieved shall either remain in custody until the holding of the Court to which the appeal is given, or shall enter into a recognizance, with two sufficient sureties, before a Justice or Justices of the Peace, conditioned personally to appear at the said Court, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded; or if the appeal be against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the person aggrieved may (although the order direct imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, deposit with the Justice or Justices convicting or making the order such sum of money as such Justice or Justices deem sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit made, the Justice or Justices before whom such recognizance is entered into, or deposit made, shall liberate such person if in custody;

"And the Court to which such appeal is made shall thereupon hear and determine the matter of appeal, and make such order therein, with or without costs to either party, including the costs of the court below, as to the Court seems meet; and, in case of the dismissal of the appeal or the affirmance of the conviction or order, shall order and adjudge the offender to be punished according to the conviction, or the Defendant to pay the amount adjudged by the said order, and to pay such costs as may be awarded; and shall, if necessary, issue process for enforcing the judgment of the court; and in any case where, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the Court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the Defendant; and in any case where, after any such deposit, the conviction or order is quashed, the Court shall order the money to be repaid to the Defendant; and the said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court;

"In every case where any conviction or order is quashed on appeal as aforesaid, the Clerk of the Peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the Clerk of the Peace, or of the proper officer having the custody of the same, be sufficient evidence in all Courts and for all purposes, that the conviction or order has been quashed."

2. Section seventy-one of the said Act is repealed, and the following substitued therefor:

"71. No conviction or order affirmed, or affirmed and amended in appeal, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant or commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

3. And whereas, in some of the Provinces of Canada, the terms or sittings of the General Sessions of the Peace or other Courts to which under section seventy-six of the said Act, Justices of the Peace are required to make Returns of convictions had before them, may not be held as often as once in every three months; and it is desirable that such Returns should not be made less frequently: Therefore it is further enacted, that the Returns required by the said seventy sixth section of the Act hereinbefore cited shall be made by every Justice of the Peace quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, to the Clerk of the Peace or other proper officer for receiving the some under the said Act, notwithstanding the General or Quarter Sessions of the Peace of the County in which such conviction was had may not be held in the months or at the times aforesaid; and every such Return shall include all convictions and other matters mentioned in the said section seventy-six, and not included in some previous Return, and shall, by the Clerk of the Peace or other proper officer receiving it, be fixed up and published; and a copy thereof shall be transmitted to the Minister of Finance in the manner required by the eighthieth and eighty-first sections of the said Act; and the penalties thereby imposed, and all the other provisions of the said Act, shall hereafter apply to the Returns hereby required and to any offence or neglect committed with respect to the making thereof, as if the periods hereby appointed for making the said Returns had been mentioned in the said Act instead of the periods thereby appointed for the same.

4. The form following shall be substituted for the form of Notice of Appeal against a conviction or order contained in the Schedule to the said Act.

### GENERAL FORM OF NOTICE OF APPEAL AGAINST A CONVICTION OR ORDER.

To C. D. of, &c., and ——— (*the names and additions of the parties to whom the notice of appeal is required to be given*).

Take notice, that I, the undersigned A. B., of ———, do intend to enter and prosecute an appeal at the next General Quarter Sessions of the Peace (*or other Court, as the case may be*), to be holden at , in and for the District (*or* County, United Counties, *or as the case may be*) of , against a certain conviction (*or* order) bearing date on or about the day of instant, and made by (you) C. D., Esquire, (one) of Her Majesty's Justices of the Peace for the said District (*or* County, United Counties, *or as the case may be*) of , whereby the said A. B. was convicted of having or was ordered to pay , (*here state the offence as in the conviction, information, or summons, or the amount adjudged to be paid, as in the order, as correctly as possible*).

Dated this day of , one thousand eight hundred and . A. B.

Memorandum.—*If this notice be given by several Defendants, or by an Attorney, it can easily be adapted.*

## SELECTIONS.

### NATURALIZATION.

The Royal Commission which reported on the laws of naturalization and allegiance on February 20, 1869, with greater fortune than some Royal Commissions which we could name, is likely to see its labours bear legislative fruit within a reasonable time. The bill introduced by the Lord Chancellor to amend the existing laws on this subject was read a second time in the House of Lords last week. No opposition was offered to the measure, and no real dissent from its principles or even details was expressed. Yet, after all, it is the play without Hamlet. We impute no fault to the bill on this head, but confessedly it abstains from any attempt to deal with the most fundamental point in the whole question—namely, what is to be the test of nationality? Let us see how this matter stands. At common law the place of birth is the only test of allegiance. All persons born within the dominions of the Crown are natural-born British subjects, and all persons born beyond the dominions are aliens. By statute British nationality extends to the second generation, so that the grandchildren of a British subject, wherever they or their fathers were born, are held within the allegiance of the Crown. We need not recapitulate the grounds upon which such a state of the law requires amendment. It was on all hands agreed that an end must be put to a system which claimed subjects to the Crown *jure soli* and also *jure sanguinis* even to the second generation. Then arose a controversy as to the new rule to be adopted as regards children of aliens born within the dominions of the Crown. On the one side the majority of the Commissoners—namely, Lord Clarendon, Sir R. Phillimore, Sir R. Palmer, Sir Travers Twiss, Sir John Karslake, Mr. W. E. Forster, and Mr. Cardwell—proposed the following rule: 'All persons born within the dominions of the Crown to be British subjects, except children born of alien fathers and registered as aliens.' On the other side Mr. Baron Bramwell, Mr. Bernard, and Mr. Harcourt held that *parentage* not *place*, ought to determine nationality. In short, the majority said: 'Children of aliens born within the dominions of the Crown shall be aliens, with power to claim the rights of British subjects.' Immediately after the publication of the Report, we in our review of the same declared that we considered 'the position of the minority the more logical and the more expedient of the two.' After the lapse of some months the Lord Chief Justice published his admirable treatise on nationality, and he supported with singular force and authority the view taken by the minority of the Royal Commissioners. His Lordship says: 'It seems impossible to doubt that it would be for the common advantage of governments and subjects if a uniform rule were everywhere adopted. But then, what should that rule be? And first, as to nationality of origin. Should descent or place of birth be the determining cause? The nations of Continental Europe have decided in favour of descent. "Almost everywhere," says Dr. Bar, "the nationality of the parent decides, without reference to the place of birth; and this must be acknowledged to be the right rule, seeing that *nationality essentially springs from descent.*" . . . . Descent, therefore, affords the true rule for determining nationality. This being so, it is obvious that, in adapting our law to this principle, there would be the twofold advantage—first, that we should be placing the law on the right foundation; secondly, that we should accomplish the all-important object of bringing it into unison with the law of other countries: a result which cannot otherwise be obtained, inasmuch as it would be at once idle and presumptuous to propose to other nations to adopt a false principle in order to adapt their laws to others.' Such, then, being the state of the controversy at the opening of Parliament, we were a little curious to see in what way Her Majesty's Government proposed to get over the difficulties besetting this cardinal point in the matter. It was rather too much to ask the Lord Chancellor to throw over the Foreign Minister, a Secretary of State, the Vice-President of the Council, the Judge of the Admiralty Court, and three great lawyers. On the other hand the Lord Chief Justice had dealt such a deadly blow at the conclusions of the majority of the Commission, that it was absurd to attempt to revive them. So the Lord Chancellor, with laudable adroitness, cut the Gordian knot by leaving the whole question at large; and so here we have before us a bill to regulate the laws of nationality studiously abstaining from any declaration of the principle upon which nationality is to be based. As Lord Hatherley puts it, "It might have been thought at first that the best step to take in legislation would be to lay down a clear definition of what ought to be held to constitute nationality, and of what constitutes an alien; but the more this is looked into, and the more we see the inconsistency of different countries, the more clearly appears the impossibility of effectually attaining that object by any Act of Parliament; for we should be legislating in a manner which affects to bind those who are resident abroad, and under a totally different jurisdiction, over which we have no control. If any definition of that kind is to be laid down, as I hope it will be, it must be as it appears in the mode pointed out by the Lord Chief Justice and by the Commissioners, viz., by international accord and treaty rather than by legislation.' Without staying to inquire whether this is a perfectly just representation of the argument of the Lord Chief Justice, we may at least rejoice that the Legislature will not be asked to affirm the erroneous dogma advanced by the majority of the Commission, and we may ourselves enjoy the innocent reflection that we hit at the very outset the blot in their Report. We are, however, very far from denying that it is absolutely essential that the nations of Europe and America should come to some general understanding upon the question in order to avoid the conflict of jurisdiction arising out of double nationality. But though such accord is desirable and necessary, yet we hold that the Legislature should have been asked to lend its sanction to the general rule that nationality should spring from descent. This general rule would of course be subject to the exception pointed out by the minority of the Commission, under which a child born and brought up in a foreign country would be enabled to claim citizenship in the country of his birth, and to the further exception that the descendant of a foreigner in the second generation should be presumed to be a citizen of the country of his birth, with power to reclaim alienage. But, as is clearly explained by the Lord Chief Justice, these exceptions must be affirmed by the harmonious voice of civilised nations. or at least should only exist by way of reciprocity. But whether the exceptions are to be allowed or not, yet his Lordship, as we understand him, would establish and hold to the primary rule of nationality by descent, and we are very strongly of opinion that this is the true doctrine.

Passing now from what is not in the bill to what is in the bill, we find first certain enactments relieving aliens from existing disabilities. Under these clauses an alien may acquire, hold, and dispose of real and personal property of every description, and title may be derived through him as effectually as if he were a natural-born British subject. This provision is not to affect any existing right, nor is to confer political rights or qualify for any franchise. Next follows a section giving power to naturalized aliens to divest themselves of their naturalization as British subjects, and to recover their status as aliens, in all cases where Her Majesty has made a convention with a foreign state enabling its citizens on naturalization as British subjects to divest themselves of their original allegiance. The fourth section, probably *consensu omnium*, abolishes juries *de medietate linguæ*. Then follows a section declaring that British subjects who have become naturalized in a foreign state shall be deemed to have expatriated themselves, but a right to return to the allegiance of the Crown within two years after the passing of the Act is reserved to all such persons. This section, if carried, will annihilate the time honoured maxim, *Nemo potest exuere patriam*, and destroy the allegiance to the Crown of some six or seven millions of persons; and yet here again we do not anticipate even the whisper of an objection. We have fought a costly war, had many a bitter quarrel, and consumed an absurd amount of valuable time and labour either in inflaming or quenching the disputes which have arisen from the old law. Its retention has, in fact, become impossible, and we have only endured its existence of late years by a studious disregard of all its practical effects.

The bill then proceeds to deal with naturalization of aliens as British subjects. At present, under 7 & 8 Vict. c. 66, the Secretary of State grants certificates of naturalization upon compliance with certain regulations issued from the Home office on August 1, 1847. On obtaining his certificate and taking the oath of allegiance, the party usually acquires all the rights of a natural-born British subject, except those of becoming a member of the Privy Council or of Parliament. These certificates were in 1851 so far limited that the rights of the holder were suspended while he was without the dominions of the Crown. The granting of the certificate is purely a matter of discretion with the Secretary of State. Under the new bill, an alien, to obtain naturalization, must have resided for five years in the United Kingdom, or have served under the Crown for five years, and must intend either to reside in the United Kingdom or to serve under the Crown. Application is to be made to the Secretary of State, whose decision is to be final, and who is not bound to assign any reason for his decision. The position of an alien so naturalized is thus defined:—

> An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, and which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.
>
> The said Secretary of State may in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.
>
> An alien who has been naturalized previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien upon the same terms, and subject to the same conditions, in and upon which such certificate might have been granted if such alien had not been previously naturalized in the United Kingdom.

There are also provisions enabling an expatriated British subject to recover his nationality under a certificate from the Secretary of State, and power is reserved for the cancellation of such certificates as well as certificates of naturalization. All the propositions upon this portion of the subject are in strict conformity with those advanced in the Report of the Royal Commission, and seem to be equally consistent with the liberal spirit of the age and the due preservation of the safety and dignity of the State.

The national status of women and children is thus proposed to be defined in the bill, and we need only note that the clauses containing these definitions seem to be in harmony both with the report and with the opinions advanced by the Lord Chief Justice.

> 1. A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.
>
> 2. A widow being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of re-admission to British nationality in manner provided by this Act.
>
> 3. Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject.

4. Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents.

5. Where the father or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject.

The bill proposes to retain to the Crown the right to grant letters of denization. It further declares that nothing in the Act shall qualify an alien to be the owner of a British ship. On this last point we may make an observation. The matter, in view of the costly and at times embarrassing protection which the Crown is compelled to afford to British subjects, is one deserving much consideration; and, strangely enough, the Report of the Commission is silent thereon. By section 18 of the Merchant Shipping Act, persons made denizens or naturalized can only be owners of British shipping provided that, during the whole period of their being so, they are, and continue to be, resident in some place within Her Majesty's dominions; or, if not so resident, members of a British factory or partners in a house actually carrying on business in the United Kingdom or some other place within Her Majesty's dominions, and have taken the oath of allegiance. The Lord Chief Justice seemed to be of opinion that this proviso furnishes sufficient security without denization or naturalization, but suggests that a license from the Board of Trade might also be insisted on as further security. On the whole the proposition of the bill seems to be the safer one; but perhaps the above section of the Merchant Shipping Act might be repealed, having regard to the strict conditions upon which naturalization is in future to be obtained and retained.—*Law Journal.*

## THE POWER OF ONE PARTNER TO BIND THE FIRM BY SEALED INSTRUMENT.

That one partner cannot bind his co-partners by any instrument under seal, is a general rule firmly established, and we believe not questioned by any decision, either in England or America. The leading case is *Harrison* v. *Jackson*, 7 Term Rep. 207, decided by the Court of King's Bench, in 1797. In delivering the opinion of the court, Lord Kenyon, C. J., said: "The power of binding each other by deed, is now, for the first time insisted on. * * * Then it was said, if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed; but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners."

The same point had already been decided in Pennsylvania, thirteen years earlier, in *Gerard* v. *Basse et al.*, 1 Dallas, 119. In that case one partner had executed a bond and warrant to confess judgment, to which there was one seal, and the signature "John A. Soyer, for Basse & Soyer." Judgment was entered on the bond against both partners, and the court held it good only as to the one signing, and gave the plaintiff leave to strike out the name of the other. In delivering the opinion of the court, Shippen, President, said: "there can be no doubt that in the course of trade, the act of one partner is the act of both. There is virtual authority for that purpose, mutually given by entering into partnership, and in everything that relates to their usual dealings each must be considered as the attorney of the other. But this principle cannot be extended further to embrace objects out of the course of trade. *It does not authorize one to execute a deed for the other;* this does not result from their connection as partners; and there is not a single instance in the books which can countenance such an implication."

The principle thus laid down in these two cases has been very rigidly adhered to in England, but in the United States there has always been more or less disposition to limit its generality, and though, as a general rule, it has not been shaken, yet several important exceptions may now be considered as firmly established in most of the states. Thus in *Hart* v. *Wither*, 1 Penn. Rep. 285, though the Supreme Court of Pennsylvannia decided that the other partners were not bound by the deed, nothwithstanding it had been given in a transaction in the course of business of the firm, and the benefit had been received by them, yet Huston, J., dissented, and stated his reasons so briefly and pointedly, that they are well worth reproducing in his own language. "The grounds on which one partner is not permitted to bind the other by deed, in England do not exist, or at least, all of them do not exist here. They are: 1st. That the consideration of a deed cannot be inquired into—here it can. 2nd. That a bond will bind the lands of any partner who has lands, after his death—here a common note, nay account, is recovered after the death of the debtor out of land. It is admitted, even there, that one partner may bind another by bond, sealed in his presence, although with but one seal. This must be solely because his assent is clearly proved by his being present and agreeing, not dissenting; now I cannot see why assent clearly proved in one way is not as effectual as assent clearly proved in another. Here, the offer was to prove that each of the partners, who were iron masters, and had lands in partnership, as well as chattles, were in the constant habit of making contracts under seal, which were ratified by the others, and the benefits enjoyed by them—that this contract, on the face of it for wood, was for wood for their iron works, and was actually used at them and the benefit enjoyed by them all. I would then have permitted this to go the jury, and if they found a clear assent either before or after, I would hold them bound. One partner is often bound in equity, differently from what he is at law, because he has received the benefit: *Lang* v. *Keppele*, 1 Bin. 123. I would confine the power to partnership transactions, and to property which came into partnership, and was enjoyed by them under a contract which they knew was made by one of the firm."

Subsequent cases, not only in Pennsylvania but in most of the other states, have established the law in substantial conformity with the principles of Judge Huston's opinion. The leading cases on this point, are *Gram* v. *Seton*, 1 Hall, 262, and *Cady* v. *Shepherd*, 11 Pickering, 400. In the former case the Superior Court of New York City, determined that one partner cannot make a sealed instrument, even though it be necessary in the usual course of business of the firm, unless authorized by the other partners, but authority need not be given expressly or under seal, but may be implied from the nature of the business or the conduct of the partners. The instrument sued on in that case was a charter party, but an elaborate opinion was given by Jones, C. J., covering the whole class of sealed instruments. In the other case, *Cady* v. *Shepherd*, the Supreme Court of Massachusetts held, that the instrument would be valid and bind the firm, if previously authorized or subsequently ratified by them, and that such authority or ratification may be by parol. It may now be taken as settled law in most of the states, that either previous authority to a partner or subsequent ratification, will make his deed valid to bind the firm, and that such authority or ratification may be by parol: *Fichthorn* v. *Boyer*, 5 Watts. 159; *Bond* v. *Aitkin*, 6 W. & S., 165 (overruling *Hart* v. *Withers*, 1 Penn. 285, and adopting the reasoning of Huston, J., already quoted); *Mackay* v. *Bloodgood*, 9 Johns. 285; *Smith* v. *Kerr*, 3 Comst., 144; *Swan* v. *Stedman*, 4 Met. 548; *Pike* v. *Ba[illegible]on*, 8 Shepl., 280; *Fleming* v. *Dunbar*, 2 Hill, S. C., 532; *Fant* v. *West*, 10 Rich. Law, 149; *Drumright* v. *Philpot*, 16 Ga. 424; *Grady* v. *Robinson*, 28 Ala 289; *Gwin* v. *Rooker*, 24 Mo. 290; *Price* v. *Alexander*, 2 Greene, Iowa, 427; *Haynes* v. *Seachrest*, 13 Iowa, 455; *Henderson* v. *Barbee*, 6 Blackf., 26; *Day* v. *Lafferty*, 4 Pike, 450; *McDonald* v. *Eggleston*, 26 Vt., 154; *Remington* v. *Cummings*, 5 Wis., 138; *Wilson* v. *Hunter*, 14 Wis., 683; *Shirley* v. *Fearne*, 33 Mi., 653; *Fox* v. *Norton*, 9 Mich. 207; *Charman* v. *McLane*, 1 Or., 339; *Lowry* v. *Drew*, 18 Tex. 786.

In a few of the states, however, it would seem that the strict technical reasoning of the English cases has prevailed, and it is held that to make the deed good there must be express authority (or ratification) *under seal: Little* v. *Hazzard*, 5 Harrington, 291; *Turbeville* v. *Ryan*, 1 Humphreys, 113; *Napier* v. *Catron*, 2 Hump. 534. In Kentucky the question hardly seems settled. The early cases of *Trimble* v. *Coons*, 2 A. K. Mars, 275, and *Cummings* v. *Carsily*, 5 B. Mon., 74, held that the authority must be under seal, but the latter case of *Ely* v. *Hair*, 16 B. Mon. 230, goes upon the ground that parol authority or ratification will be sufficient, but does not notice or expressly overrule the previous decisions.

*Trimble* v. *Coons*, *Peirson* v. *Carter*, 3 Murphy, 321, and a few other of the earlier American cases, appear to sanction the English rule (founded on the ancient decisions, that the same piece of wax might serve for the seals of several obligors), that if the deed was sealed by one in the *actual presence* of the other, it would bind both, thus making a most singular confusion of the authority itself, and the evidence by which it is proved, the foundation of an unsubstantial distinction effectually disposed of by a few words in the opinion of Huston, J., in *Hart* v. *Withers*, already quoted This distinction is now, however, abandoned in most of the American cases. In *Modisett* v. *Lindley*, 2 Blackf. 1 19, it is expressly held that presence is merely evidence of consent, for there the partner, though present, not having knowledge of the act, was held not bound. But in *Gardner* v. *Gardner*, 5 Cush. 483, it is held that signing by one person (whether partner or not) for another *in his presence*, and by his express direction, is a good signing by the latter; the opinion of Shaw, C. J., though very brief, and apparently not much considered, appearing to sustain the soundness of the distinction between an act done in or out of the presence of the party sought to be charged. In *Lambden* v. *Sharp*, 9 Humphreys, 224, it was held that where there are more signatures than seals, the court will presume that several of the parties adopted the same seal, but this presumption may be rebutted by evidence, and it will then be a question for the jury, whether the instrument is sealed by all. And if the signature be in the firm name only, it will be presumed to be the several signature and seal of all the partners, but open to rebuttal by plea and evidence as in other cases. To the same effect are *Davis* v. *Burton*, 3 Scam., 41, and *Hatch* v. *Crawford*, 2 Porter (Ala.), 54.

In all the foregoing cases it is to be borne in mind that the instrument must be made in the firm name, and purport to be the act of the firm. For if the partner though authorized to execute a deed in the partnership name, does in fact make it in his own name merely, it will bind himself only, and will moreover merge the firm debt, if the latter be on a simple contract, so as to discharge the other partners: *United States* v. *Ashley*. 3 Wash. C. C., 508. And the same effect will follow according to the authority of some cases, if the partner signing the firm name is not authorized to do so. In such case the suit should be against the party signing as on his individual obligation: *Clement* v. *Brush*, 3 Johns. Cas. 180; *Button* v. *Hampson*, Wright (Ohio), 93; *Nannely* v. *Doherty*, 1 Yerger, 26; *Waugh* v. *Carriger*, Id., 31; *Morris* v. *Jones*, 4 Harring. 428. And if the bond be declared on against both as a joint obligation, no recovery can be had even against the one who signed: *Lucas* v. *Sanders*, 1 McMullan, 311. In an action by a firm, however, on a sealed instrument, the defendant cannot plead that it was executed by one partner only, for the suit is a ratification by all who are joined in it: *Dodge* v. *McKay*, 4 Ala. 346.

The doctrine that a bond in the firm name by a partner not authorized to make it, merges a simple contract debt of the firm and substitutes the sealed obligation of the partner signing, has not, however, commanded universal assent. In *Doniphan* v. *Gill*, 1 B. Mon. 199, it was expressly rejected, the court holding that there was no merger where it appeared on the face of the instrument that there was no such intention in the minds of the parties at the time of execution. To the same effect, apparently, are *Fronebarger* v. *Henry*, 6 Jones, Law, 548, and *Despatch Line* v. *Bellamy Man. Co.*, 12 N. H. 235.

All of the foregoing cases, moreover, assume that the transaction in which the bond is made is one arising in the due course of the partnership business. Otherwise the partner is on the same footing with any stranger, and to validate his act it must appear to have been expressly authorized under seal. Thus, in *Ruffner* v. *McConnel*, 17 Ills., 212, it was held that one partner, even though expressly authorized by parol, cannot convey land or make a contract specifically enforcible against the others. See also *Bewly* v. *Innis*, 5 Harris, 485, and *Snyder* v. *May*, 7 Harris, 235. For the same reason bonds of submission to arbitration, and warrants to confess judgment, have been uniformly held invalid, unless authorized by sealed instrument; they are not in the regular course of business, and therefore not partnership transactions: *Karthaus* v. *Ferrer*, 1 Pet., 222; *Crane* v. *French*, 1 Wend., 311; *Armstrong* v. *Robinson*, 5 G. & J., 412; *Barlow* v. *Reno*, 1 Blackf., 252; *Sloo* v. *State Bank*, 1 Scam. 428; *Mills* v. *Dickson*, 1 Richards, 487. But if an award be made, and the money received by both, or by one in the firm name, the acceptance will be good either as a release or as accord and satisfaction: *Buchanan* v. *Curry*, 19 Johns. 137; *Lee* v. *Onsott*, 1 Pike, 206.

Having thus considered how one partner may bind his co-partners by sealed instrument *with their consent*, and how that consent may be proved, we come now to how he may bind them *without their consent*. And first, he may *release a debt* by sealed instrument. This is well settled both in England and the United States: *Bowen* v. *Marquand*, 17 Johns, 58; *Smith* v. *Stone*, 4 Gill & J. 310; *Morse* v. *Bellows*, 7 N. H., 549; and he may authorize an agent, under seal, to release: *Wells* v. *Evans*, 20 Wend., 251; S. C., 22 Wend., 324. So he may sign a composition-deed with a debtor of the firm: *Beach* v. *Ollendorf*, 1 Hilton, 41. The reason that a release is good is stated by Kent, C. J., in *Pierson* v. *Hooker*, 3 Johns, 68, to be that the deed is good as to the partner signing, and a release by one of joint creditors is good as to all, citing *Ruddock's case*, 6 Co., 25. Perhaps an equally satisafctory reason is, that the rule itself which makes the deed of one partner in the partnership name bad, extends only to those cases in which the effect of the deed would be to charge the partners with a new liability.

A second class of cases, where a partner may bind his co-partners under seal without their consent, express or implied, was marked out by Chief Justice Marshall at an early day. In *Anderson* v. *Tompkins*, 1 Brock, 456, he said: "The principle of *Harrison* v. *Jackson*, is settled. But I cannot admit its application in a case where the property may be transferred by delivery under a parol contract. But I cannot admit that a sale so consummated is annulled by the circumstance that it is attested by a deed." The principle thus enunciated has always been favorably regarded by the American courts, and it is now well settled in most of the states, that if the act done would have been valid without a seal, the addition of the seal does not vitiate it: *Tapley* v. *Butterfield*, 1 Met. (Mass.), 515; *Milton* v. *Mosher*. 7 Metc., 244, *Everitt* v. *Strong*, 5 Hill (N. Y.), 163; *Robinson* v. *Crowder*, 4 McCord, 537; *Dubois' Appeals*, 2 Wright (Penn.), 236, *Deckard* v. *Case*, 5 Watts, 22; *McCullough* v. *Summerville*, 8 Leigh, 415; *Forkner* v. *Stuart*, 6 Grattan, 197; *Lucas* v. *Bank of Darien*, 2 Stew., 280; *Human* v. *Cuniffe*, 32 Mo., 316. In Kentucky, however, and perhaps in the other states where the strict ruling of the English cases is followed, this exception is not allowed. Thus in *Montgomery* v. *Boone*, 2 B. Monr., 244, Robertson, C. J., says: "The principle thus settled as to *deeds*, seems to have been recognized as applicable to all contracts under seal to pay money, even though a seal was not essential to the obligations of such contract. This may have been a perversion or extension of the principle as to *deeds* which was probably applicable at first only to such writings as would be ineffectual without a seal, and not to such as might be as binding and effectual without as with a seal. All judicial questions, however, has been concluded on this subject also by this Court."

In conclusion, we may regard the American decisions as now pretty well harmonized on the general principle, that a sealed instrument, executed by one partner only, in the firm name, is not valid to create a new liability on the part of the other partners, unless such liability is one which the partner could have created without seal, or unless his act was previously authorized or subsequently ratified by the other partners; and that such authority or ratification may be by parol, and may be inferred by a jury from the acts of the parties or the course of the business.—J. M. L.—*The American Law Register.*

## ONTARIO REPORTS.

### COMMON LAW CHAMBERS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Smith v. Smith et al.

*Costs—Certificate—Discretion of arbitrator.*

A case was referred to arbitration, the costs of the action to abide the event of the award, the costs of reference and award to be in the discretion of the arbitrator, who was to havé all the powers as to amendment and *otherwise* of a judge at Nisi Prius. The award ordered the defendants to pay the costs of the reference and award; and the arbitrator certified "to prevent the defendants deducting costs."

*Held,* that the order conferred upon the arbitrator the power of certifying for costs, which impliedly took away the jurisdiction from a Judge in Chambers.

[Chambers, March 28, 1870—*Mr. Dalton.*]

This was an application made to set aside an *ex parte* order for Superior Court costs made by Mr. Dalton.

The action was referred to an arbitrator under the Common Law Procedure Act by the learned Chief Justice of the Common Pleas, sitting in Chambers; and by the order the costs of the action were to abide the event of the award, and the costs of the reference and award were to be in the discretion of the arbitrator, who was to direct by whom, to whom, and in what manner the same should be paid. And it was ordered that the arbitrator should have all the powers as to amendment of pleadings, and otherwise, of a judge sitting at Nisi Prius.

The award was that, after deducting the defendants' set-off, the arbitrator found them indebted upon the cause of action referred, in a balance of $90 44; and as to costs, that the defendants should pay the plaintiff his costs of the reference and award; and the award concluded thus: "in the exercise of the power of a judge sitting at Nisi Prius, conferred upon me by the said order, I do hereby certify to prevent the defendant's deducting costs."

Mr. Reeve (*Richards & Smith*) for plaintiff.

*J. K Kerr* for defendants.

Mr. Dalton.—The case is one in which from the nature of the claim and the amount recovered a certificate should be given, unless the facts take away jurisdiction.

The words of the power conferring upon the arbitrator "*all the powers*" as to amendment of pleadings and *otherwise* of a judge sitting at Nisi Prius, must be held to convey the power of certifying for costs. It cannot be supposed that the learned Chief Justice by these general words of his order, did not mean to include so prominent, and beneficial a power, so frequently discussed, as that of certifying, and I think the arbitrator had that power. The arbitrator himself evidently thought so, and I agree with him. He has by his award certified under his power.

Several English cases to which I have been referred do not apply to the particular circumstances here. The cases which do apply are, *Calder* v. *Gilbert,* 3 P. R. 127, and the cases cited in that case.

In *Calder* v. *Gilbert* the arbitrator having the power did not certify, but it does not follow from that that he had not come to a decision on the point, and it was held that the power of certifying having been delegated to him, was impliedly taken away from a judge. Here the arbitrator has certified.

It would surely be an absurd conflict of authority that I should adjudicate upon a question which the arbitrator having full authority has already determined.

If these facts had been known to me I should not have made the order for Superior Court costs, and I now discharge it.

### Grover & Baker Sewing Machine Company v. Webster.

*Commission to examine witness—Evidence Act.*

An order for a commission to examine a party to a cause will not be granted, notwithstanding 33 Vic. cap. 13, unless the applicant shews some great and pressing inconvenience preventing his personal attendance.

[Chambers, March 30, 1870—*Mr. Dalton.*]

The plaintiffs obtained a summons calling on the defendant to shew cause why a commission should not be ordered to issue for the examination of one of the plaintiffs on their behalf.

*Alex. McDonell* shewed cause.

Mr Dalton.—The words of our statute authorizing the issue of a commission are permissive: the court or judge "may" order.

Our evidence act, 33 Vic. cap. 13, makes a party to a cause a good witness, either upon *vivâ voce* examination or depositions, and the cases in England are clear that a commission may, under proper circumstances, issue for the examination of a party to the cause on his own behalf.

Such a means of taking evidence is always unsatisfactory in comparison with an examination in open court at the trial, and the objection applies with far greater force to a party than to an ordinary witness. The affidavit of the plaintiff's attorney here does not disclose the fact that the witnesses are plaintiffs; that comes from the other side, and no particular reason is shown why these plaintiffs, sought to be examined, cannot personally attend.

The expense of two witnesses from Boston one would suppose not greater than that of a commission.

In the ordinary case of examining a witness unconnected with the suit, residing in a foreign country, we know that parties have no means of compelling personal attendance, and a written examination must suffice, because it is all that can be had.

But for all that appears these parties can come. They are to testify in their own interest and have control of the cause. Then why should they not come? It is very important for the ends of justice that witnesses should be personally examined before the jury; and this applies with much greater force, as I have said, to parties to the cause establishing by their evidence their own case. Preëminently in their case there should be cross-examination before the jury, where it is possible.

I think the plaintiffs, to entitle themselves to this commission, should have shown some great and pressing inconvenience preventing their personal attendance; but they shew nothing but the fact that they reside abroad. *Castelli* v. *Groome*, 18 Q B. 490, completely justifies my dismissing this summons. Costs to be costs in the cause to the defendant.

*Summons discharged.*

See Ch. Arch. 12th ed. 330, 337; *Fischer* v. *Hahn*, 32 L. J. C. P. 209; *Castelli* v. *Groom*, 18 Q. B. 490, 21 L. J. Q. B. 308.

### Lewis v. Teale et al.

*Replevin Act—C. L. P. Act—Pleading several matters—Interlocutory judgment.*

The provisions of the Common Law Procedure Act as to pleading several matters apply to replevin.

A plea of the general issue by statute and a plea denying the property of the plaintiff in the goods cannot be pleaded together without leave.

An interlocutory judgment is well signed in replevin by following the directions given in Rule 26 H. T., 13 Vic.

[Chambers, April 4, 1870—*Mr. Dalton.*]

Replevin by the colonel of a volunteer regiment against two of his captains for some band instruments.

The defendant Macdonald pleaded, without leave obtained: 1. *Non cepit*, by statute; 2. *Non detinet*, by statute; 3. Goods not the plaintiff's; and the defendant Teale pleaded in addition, also without leave, as a fourth plea: No notice of action.

The plaintiff thereupon signed interlocutory judgment as on default of plea by filing in the proper office a copy of the declaration, with the words "Interlocutory judgment signed this eighteenth day of March, A.D. 1870," in the margin, and signed by the Deputy Clerk of the Crown.

*J. A. Boyd*, for the defendants, applied to set aside the interlocutory judgment with costs, on the grounds—1. That the pleas were properly pleaded under the Replevin Act. sec. 15, no leave being necessary. 2. That, even if leave necessary, plaintiff should have moved to set the pleas aside, and should not have signed judgment. 3. That as to the defendant Macdonald, the pleas are allowable without an order by the 112th sec. of C L. P. Act. 4. That the judgment is irregular in form, it not appearing to be a judgment of *nil dicit*, and in not praying for assessment and return of the goods.

The following authorities were cited on the argument: C. L. P. Act, sec. 118; Con Stat. U. C. cap. 29, secs. 15, 16; 23 Vic. cap. 45, sec. 9; *Wakefield* v. *Bruce*, 5 Prac. R. 77; *Stewart* v. *Lynar*, 1 Ir. L. R. 193; *Reid et al* v. *New*, 4 Prac. Rep. 25; *O'Donohoe* v. *Maguire*, 1 Prac. Rep. 181; *Johnstone* v. *Johnstone*, 8 U. C. L. J. 46; *Leeson* v. *Higgins*, 4 Prac. Rep. 340; *Chadsey* v. *Ransom*, 17 U. C. C. P. 629.

Mr. Dalton—The first question is in substance whether the provisions of the Common Law Procedure Act apply to pleadings in the action of replevin.

If the 15th section of the Replevin Act stood alone, no doubt the defendant might plead several pleas without leave of the court, but the evidence is, to my mind, very strong that the provisions of the Common Law Procedure Act as to pleadings are intended to apply to replevin. It was passed after the Replevin Act, and the expressions in the 96th, 113th and 114th sections shew such intention. The judges thought so, for in Rule No. 2 of the rules passed in pursuance of the Common Law Procedure Act, avowries and cognizances are put upon the footing of other pleadings.

Mr. Boyd has referred me to a decision of the late chief justice of the Queen's Bench—*Leeson* v. *Higgins*, 4 Prac. Rep. 340—as to the Ejectment Act, which would from analogy bear upon the present question; but, on the other hand, it has been decided by the court of Common Pleas, in *Chadsey* v. *Ransom*, *ante*, that the 222nd section of this act does apply to proceedings in ejectment, and the judgment in that case justified the act of the judge in allowing at *Nisi Prius* a new claim of title to be added for the plaintiff.

All considerations of practical convenience are against the construction Mr. Boyd contends for.

Then the proper mode of taking advantage of a breach of the rule is to sign judgment: section 118.

As to the pleas of defendant Macdonald, I think they are not within the 112th section. The general issue by statute has a very different meaning from any plea mentioned in that clause

The form of interlocutory judgment allowed by Rule 26 of H. T. 13 Vic. I have always understood to apply to every case where the judgment to be signed was interlocutory.

As to the merits, the judgment should be set aside on payment of costs.

### The Union Permanent Building and Savings Society v. The Citizens Insurance and Investment Co.

*Service on foreign corporation—Contract.*

Service of process was effected on an insurance company whose head office was in Montreal, out of the jurisdiction, by serving the manager there. The insurance, however, was effected, and the policy delivered in Toronto, though signed and sealed by the Company in Montreal. *Held*, that the service was good.

[Chambers, May 11, 1870.]

*J. F. Smith* obtained a summons on behalf of defendants calling on the plaintiffs to show cause why the writ of summons and the service thereof on the manager of the defendants, at the head office in Montreal, should not be set aside on the grounds, 1, that the defendants are a foreign corporation, domiciled out of the jurisdiction: 2, that the cause of action arose out of the jurisdiction; and 3, that the policy on which the action was founded was signed and sealed in Montreal, out of the jurisdiction.

*W. M. Clark*, for the plaintiffs, showed cause, and filed an affidavit setting forth, that the defendants were incorporated by acts of the Province of Canada, and were authorised to do business throughout the whole of the then Province, and to open agencies or branch offices for the transaction of their business; that the application for insurance was made, and the premium therefor paid to the defendants' agent in Toronto, and that the policy was delivered to the plaintiffs in Toronto by the agent of the defendants.

Mr. Dalton—The cases in which a foreign defendant may be served out of the jurisdiction are, 1, where the action is brought for a cause of action which arose in Ontario—which would mean in this case both contract and breach—or, 2, for breach of a contract made in Ontario—and I think this policy of Insurance was so made. In *Chapman* v. *Cottrell*, 8 Hurl. & Colt. 865, a promissory note made, as far as writing and signing could make it without delivery—in Palermo—was sent by the maker to his own agent in London and there delivered to the payee, that was under this statute held to be a contract made in England. Baron Martin in that case puts the case of a deed. He says: "Suppose a deed signed and sealed, and sent to an agent to deliver, but before he does so the delivery is revoked, that is no valid deed."

I shall, therefore, discharge the summons with costs.

*Summons discharged with costs.*

## ENGLISH REPORTS.

### COMMON PLEAS.

### Sykes and Others, Executors, v. Sykes and Another.

*Executor* de son tort—*Agent*—Fi. fa.

The executor and executrix of S. appointed C., the husband of the executrix, to continue to carry on the business of S. before probate. A judgment was entered up against C. as executor of S.

*Held*, that the sheriff could not seize goods of S. in the possession of C. as manager for the executors.

[18 W. R. 551.]

This was an action by Albert Sykes and Hannah Shaw, executor and executrix of Ellen Sykes, against the sheriff of the West Riding of Yorkshire, and against Love, an execution creditor of W. H. Shaw, who had entered up judgment against W. H. Shaw and issued execution against W. H. Shaw as executor of Ellen Sykes. The declaration was for trover and trespass. The defendants severally pleaded the general issue and a justification under a writ of *fi. fa.* on a judgment entered up against W. H. Shaw as executor of Ellen Sykes.

It appeared at the trial that Ellen Sykes carried on the business of manufacturing chemist in the West Riding of Yorkshire, and that W. H. Shaw managed the business for her. She died in 1868 and by her will appointed Albert Sykes, resident in Scotland, executor, and Hannah, the wife of W. H. Shaw, executrix. W. H. Shaw continued to manage the business. In March, 1869, Love obtained judgment by default against W. H. Shaw as executor of Ellen Sykes on a bill of exchange. A writ of *fieri facias* was sued out and delivered to the sheriff of the West Riding of Yorkshire, against W. H. Shaw as executor of Ellen Sykes. The officer, in execution of this writ, entered the chemical manufactory occupied by W. H. Shaw, seized and sold goods sufficient to satisfy the judgment. After the seizure and sale of the goods, Albert Sykes and Hannah Shaw proved the will as executor and executrix of Ellen Sykes. At the trial of the present action there was conflicting testimony as to whether W. H. Shaw was managing the business as manager and servant of the executor and executrix, or as executor *de son tort*. The jury found that the goods were in his hands as agent of the executors. A verdict was entered against the sheriff for £100, leave being reserved to enter a verdict or nonsuit on the ground that the sheriff was justified under the *fi. fa.* in seizing the goods and a verdict was entered for the defendant Love, the execution debtor.

*Field*, Q.C., having obtained a rule accordingly for the sheriff, and *Kemplay* having obtained a rule calling on the defendant Love to shew cause why the verdict found for him should not be set aside and a new trial had, on the ground of misdirection of the learned judge in ruling that there was no evidence to fix Love with liability for the seizure of the goods by the sheriff

*Kemplay* shewed cause against the rule obtained by the sheriff.—The jury have found that the executors continued the business. The executors, although they did not prove the will till after the seizure, yet their title relates back to the death of the testator. They could appoint an agent. He cited Williams' Executors, 6th ed. 247, 291. The executors have the same power to deal with the property before probate as subsequent to it: 5 Coke, 28. An executor may, before probate, appoint an agent: Williams on Executors, 251, 253; *Paull* v. *Simpson*, 9 Q. B 365; *Hall* v. *Elliott*, 8 Peake N. P. C. 119; *Hooper* v. *Summersett*, Whitwick, 16. The other side are precluded from saying that a man cannot be his wife's servant; *Sharland* v. *Mildon*, 5 Hare, 469. [Bovill, C. J.—In *Padgett* v. *Priest* there was no rightful executor.] *Cottle* v. *Aldrich*, 4 M. & S. 175, is the nearest case to this; but the jury found the other way: *Hill* v. *Curtis*, 14 W. R. 125, 35 L. J. Ch. 138.

*Field*, Q C., and *Forbes*, in support of the rule.—The only evidence of Shaw being the agent to the executors is the statement of the Scotch executor that he was so: *Webster* v. *Webster*, 10 Ves. 93 [Bovill, C.J.—You must make out that Shaw, who intermeddles with the estate as agent of the executors is a *tort-feasor*.] The goods were in Shaw's possession. *Sharland* v. *Mildon*, 5 Hare, 469, is clearly an authority in my favor.

Bovill, C. J.—The judgment in the original action was against Shaw as executor of Ellen Sykes. The writ of execution directed the sheriff to levy goods of Ellen Shaw in his hands as executor. The sheriff accordingly seized and sold the goods in question. There is no doubt that they were the goods of Ellen Sykes, and that they were in Shaw's possession. The question is if they were in his hands to be administered by him, as executor, at the time of seizure. The executors, who had been appointed by the will, had acted, but they did not prove the will until after the goods were levied under the writ of execution. The question left to the jury was whether the goods were in the hands of Shaw to be administered by him as executor *de son tort*, or whether they were in his hands as the agent of the plaintiffs in the present action, the executors named in the will. There was evidence on both sides, and the jury found that the goods were in Shaw's possession as the plaintiffs' agent. We must take their verdict as conclusive in these facts. This was the proper question to be left to the jury, and is the same question as was left to the jury in *Cottle* v. *Aldrich*, for the question there was whether the evidence showed that the defendant was acting merely as the agent of one of the executors who had not proved the will. The jury found that he voluntarily interfered as executor without authority. Notwithstanding the finding of the jury in the present case, it has been argued that in law, as Shaw had possession of the goods, he is executor *de son tort*, and must be treated as such. The questions, therefore, arise if Shaw can be treated as executor *de son tort*, and if the goods were in his possession in that character. Now, in point of fact, the jury have decided that Shaw acted as agent for the executors named in the will, and said that the goods were in his possession in that capacity. If Shaw had brought the present action it would not have been competent for him to deny that he was executor, because he suffered judgment to be recovered against him in that character. No doubt, in the former action, if he dealt with the goods of the deceased without any authority, and goods of the deceased are in his possession, the defendant was right in seizing them. But that is not the case here. Are the executors before probate wrong-doers in dealing with the goods? For if so, Shaw, their agent, is also a wrong-doer, and is consequently executor *de son tort*, and the sheriff acted rightly in seizing the goods. This depends on what the position is of executors before they have obtained probate. Executors obtain their title from the will itself. Whereas administrators only obtain their title from the Ordinary.

Executors have power to deal with the property before probate as well as subsequent to it, their title is just as good, they have nearly the same powers except in certain matters regarding suits when probate is required as evidence of their title. If acts done by executors before probate are lawful acts; acts done by their agents are equally lawful. It is equally true, that a person cannot be charged as executor *de son tort* when the will is proved, if he intermeddles with the estate; but that if he intermeddles with the estate before probate, he can be so sued. The reason is apparent: if persons act as executors before probate, they cannot afterwards deny they are so; when an executor is sued before probate it is not stated in the writ that he is executor *de son tort*, he is only estopped from denying at the trial that he is executor, and is called executor *de son tort*. But it does not follow from that that either he or his agents are *tort-feasors*, they are not. If his acts are lawful, his agent's acts are also lawful, if they are acts that might have been done and are authorised by him. If an executor proves a will and employs a person to intermeddle, the agent cannot be treated as an executor *de son tort*. And also if an executor is named in a will, he has a legal title, and can appoint an agent to act for him, and when the agent has so acted he cannot be treated as an executor *de son tort*.

In *Hooper* v. *Summersett* it was assumed that the husband and wife were acting together, and that the husband acted on his own behalf, and not as his wife's agent. If it could have been made out that he was acting as the agent of his wife, the case would have been differently decided, and it appears that is correct by the case of *Cottle* v. *Aldrich*. The question there was whether after the death of J. A., the defendant voluntarily interfered as executor of C. A. without authority, or merely acted as an agent of the executor before probate. From the case of *Hall* v. *Elliott* it appears that a man who possesses himself of the effects of the deceased, under the authority and as agent for the rightful executor, cannot be charged as executor *de son tort*. Where a person intermeddles in an intestate's affairs, and his servant, by his orders, sells goods of the deceased, and pays over the money to him, not only the master would be a *tort-feasor* and liable to be sued as executor *de son tort*, but also his servant. That was so decided in the case of *Padgett* v. *Priest and Porter*. The rule, however, is subject to the qualification, stated by the present Lord Chancellor in *Hill* v. *Curtis*, that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account. In that case, in answer to a bill filed for an account against an executor *de son tort*, the defendant pleaded that he acted as agent of the rightful administratrix, and had subsequently accounted to her for all the assets of the deceased which had come to his hands. The Lord Chancellor said, "Here the agency did exist, supposing the lady acting at that time was acting rightfully. She was acting wrongfully, and therefore, at that period there could be no agency; but the moment she acquired a rightful title the title related back to all her intermediate acts. If so, was he not the agent of the lady, and properly suable only by her? It is not necessary to inquire into what the rule may be as regards a person employed by an administrator before administration, except that if the rule laid down by the Lord Chancellor is correct, *a fortiori*, would the agent of an executor before probate be relieved. The case of *Sharland* v. *Mildon* was the case chiefly relied upon by Mr. Field There the widow of the deceased person, intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and employed Hewish to collect the debts owing to the testator. The Vice-Chancellor, Wigram there treated the widow as a *tort-feasor*. But that is not the case here, for here the executors are not proved to have been *tort feasors* at all, for if that had been proved, Shaw would certainly have been liable.

*Sharland* v. *Mildon* was decided on *Padgett* v. *Priest*, but that was a case of intestacy, and therefore Priest and Porter (the agents of the administrators) were wrongdoers; but here Shaw was appointed manager and agent by the persons named as executors in the will. If there was any analogy between *Sharland* v. *Mildon* and *Padgett* v. *Priest* it was rightly decided. *Sharland* v. *Mildon* is cited by the Lord Chancellor as rightly decided, but he applied the doctrine of trusts in the case of an agent acting for a person before she has obtained administration. The rule must therefore be discharged as far as the sheriff is concerned, and the verdict must stand; for the executors before probate could lawfully appoint an agent to carry on their business.

Montague Smith, J.—Love entered up judgment by default against Shaw. as executor of Ellen Sykes, and then a *fi. fa.* is directed to the sheriff which in terms followed the judgment. The sheriff then seizes and sells the goods in possession of Shaw. There is no doubt that the judgment binds Shaw, and if he had brought the present action against the sheriff he could not have denied that they were his goods or the goods of Ellen Sykes. The present plaintiffs are the executors of Ellen Sykes, and they say that the goods in the possession of Shaw belong to them as her executors, that they are in his possession as their agent, and that they are not in his possession as executor of Ellen Sykes.

The question here is, if these goods were in the hands of Shaw as executor of Ellen Sykes, so as to be liable to be taken by the sheriff on a *fi. fa.* issued against him as such executor. Shaw was employed by the plaintiffs to manage the business of Ellen Sykes, and was their agent for that purpose, and this was so found by the jury. It is then said that, notwithstanding that the goods were liable to be seized in execution because probate at that time had not been taken out by the executors, that they could not appoint an agent, and that therefore Shaw was liable to be sued as an executor *de son tort*, and the goods were rightly seized. There is no doubt that he was not in possession of the goods as a *tort-feasor*, but under the authority of the rightful executors; and, unless the mere fact of executors acting before they have obtained probate makes them *tort-feasors*, and therefore makes Shaw executor *de son tort*, the sheriff does not establish his defence to this action. But executors have the same power to act before obtaining probate as subsequently to having obtained it. Probate is only the evidence of their title under the will, and not the title itself. This is clearly shown in this way:—Executors may issue a writ and proceed with their action before they have obtained probate, and it is sufficient if they obtain it before they go to trial. It therefore follows that executors can rightly dispose of property before probate, and that subsequently they can appoint agents for that purpose. This act of theirs cannot be treated as a wrongful act; they were no wrongdoers. Doubts have arisen in cases like the present, and it seems to be thought by some that, as an executor before probate must be sued as an executor *de son tort*, that therefore he has committed a wrongful act. Where an executor named in a will is sued before probate on account of his having intermeddled with the property, he is estopped from denying that he is executor, and I should say that is a more proper term to use than executor *de son tort* in that case would be, executor by estoppel. Then it appears that this misapprehension has arisen from treating an executor *de son tort* as a wrongdoer. When that term is applied to an executor before probate it is a wrong term to use. These goods were not leviable by the sheriff because they were not in Shaw's hands as executor.

Brett, J.—It has been argued that Shaw was to be considered as an executor *de son tort* although he acted only as servant to the executors, because the executors were wrongdoers before probate of the will; and that they must be treated as such until the will is proved. Executors named in a will can never be treated as wrongdoers. Mr. Field was obliged to argue that the question left to the jury in *Cottle* v. *Aldrich*, as to whether the defendant voluntarily interfered as executor of C. A. without authority or acted merely as an agent was wrong. If *Sharland* v. *Mildon* is treated in the same way and the conclusion was arrived at, that Hewish intermeddled with the debts not only as servant to the testator's widow, it is intelligible Besides that there are reasons why a court of equity should decide that such a person must remain a party to a suit. The rule must therefore be discharged against Love. The rule obtained by the plaintiff was not argued, and was therefore discharged.

*Rule discharged.*

## IRISH REPORTS.

### Margaret Leahy (*a minor*), by John Leahy, *her next Friend* v. James Phelan.

*Practice—Obtaining extension of time to plead—Taking a step in the cause after notice of irregularity—179th General Order.*

Obtaining an extension of time to plead is not a waiver of the defendant's right to move to set aside the plaint for irregularity.

[18 W. R. 584.]

Motion by defendant that the filing of the plaint be set aside as irregular, as no consent in writing by any person to act as next friend of the minor plaintiff had been lodged in the proper office of the court pursuant to the statute.

The plaint in this case was filed on the 18th February, 1870. On the 1st March, 1870, the defendant obtained an order extending the time for pleading, and on the 4th March the time was further extended up to the 8th March.

It was admitted that the filing of the plaint was irregular for want of the proper consent, and the only question was whether this irregularity had been waived by obtaining an extension of time for pleading.

*Lyster*, in support of the motion.—It may be contended that, as the defendant obtained an extension of time to plead after notice of the irregularity, that he has waived his right to have this irregularity amended under the 179th General Order, 1854. This order is to the effect that no application to set aside proceedings for irregularity shall be allowed if the party applying have taken a fresh step after knowledge of the irregularity. Obtaining an extension of time to plead is not a "step in the cause," so as to waive defendant's right to set aside the filing of the plaint. There is no exact decision on the point, but the principle is recognised in the rule which has now become settled practice, that obtaining an extension of time to plead is no waiver of the defendant's right to move for security for costs: *Clarke* v. *Riordan*, 9 Ir. C. L. App. 84; *Stewart* v. *Ballance*, 10 Ir. C. L App. 1.

*Kavanagh*, for the plaintiff.—The defendant is now precluded from making the objection. He has taken a fresh step after notice of the irregularity, and the 179th General Order is a bar to this application. The cases cited do not apply. They were not decided on the principle that obtaining an extension of time is a "step in the cause," but on the special nature of the applications. This motion comes too late; the 179th General Order directs that applications of this nature should be made within a reasonable time: *Roche* v. *Wilson*, 8 Ir. C. L. 252; *Price* v. *Powell*, 6 Ir. Jur. 277.

*Lyster* in reply.

Lawson, J.—It has been clearly decided that obtaining an extension of time to plead is no waiver of a defendant's right to obtain security for costs. This case is somewhat different and raises a point which has not yet been decided. I think that obtaining an extension of time to plead should not operate to prevent the defendant from moving to set aside a plaint for irregularity, especially when that irregularity, as in this instance, is a matter of substance. I must, therefore, grant this motion.

*Motion granted.*

## UNITED STATES REPORTS.

### Friedman v. Railroad Co.

**The dying declaration of the deceased, as to the cause of the accident, is not evidence in an action for negligence.**

Opinion by Hare, P. J., July 2, 1870.

This was an action brought by a widow and her children to recover damages for the death of her husband, who was fatally injured by the wheels of a passenger car belonging to the defendants. The plaintiff offered to prove the dying declaration of the deceased, that his death was due to the negligence of the conductor. This evidence was objected to and admitted under an exception. The point is now before us on a motion for a new trial.

A death-bed declaration is a statement made out of court and brought before the jury indirectly through the testimony of witnesses. It is therefore contrary to the rule which forbids hearsay evidence. The reason for this exception has been differently stated. The law, it has been said, presumes that a dying man can have no motive to falsify the truth, and standing in the shadow of another life does not need the sanction of an oath.

If this were the foundation of the doctrine, no declaration made in the immediate view of death could be shut out, and a man might be convicted of theft or arson, on evidence that he had been charged with the offence by some one who was about to leave the world. The authorities, however, seem to agree, that such proof can only be adduced in trials for murder, and to show the cause of the death. It is therefore the nature of the offence, and not the situation of the witness, which justifies the relaxation of the rules of evidence. The fear of detection naturally prompts the murderer to choose an occasion when his victim is alone; if the statements of the latter were not admissible the crime might go unpunished for want of proof. This argument was felt with peculiar force in earlier times when violence was more common than it is at present, and a practice to which necessity seems to have introduced, has grown inveterate through the lapse of time.

It is obvious, that a doctrine which is so strictly limited in criminal cases can hardly apply in civil. Conceding that the statements of a dying man carry as much weight with them as if they were under oath, there are other considerations which should not be overlooked. To render testimony safe it must be subject to cross-examination. It is not enough that the witness desires to speak the truth, there should be an opportunity to sift his statements, and elicit facts and circumstances that may have been overlooked from inadvertence. The suppression of a seemingly immaterial incident may lead to error without an intention to deceive. The deceased is said to have declared in the present instance, that his death was caused by the fault of the conductor, and the jury may have thought that his conclusion was one which they were not at liberty to disregard. If he had been required to state the grounds upon which this opinion was based, it might have appeared that the conductor was free from blame, and that the accident was due to his own negligence. There is another danger that the statements of the dying man will not be faithfully repeated by those who hear them Their passions or interests may lead them to suppress certain portions of the story, and give undue prominence to others. The authorities afford but little light on a point which is of so much importance that it should be well settled.

Dying declarations have been treated in some instances as admissable under all circumstances and for every purpose: *Clymer* v. *Settler*, 3 Bur. 1244; *Farrund* v. *Shaw*, 2 N. C. Repository, 402; while they have been viewed in others as an exceptional growth of the criminal law which has no place in civil jurisprudence: *Wilson* v. *Howen*, 15 Johnson, 284. In *Fallom's Adm'r.* v. *Ammon*, 1st Grant's Cases, 125, cited at the argument for the plaintiffs, the declarations were admissable on other grounds, and did not require the aid of the principle under consideration. There is seemingly but one decision bearing on the only question which admits of a reasonable doubt; whether such statements can be received to show the cause of the death when it is material to the issue. I refer to the case of *Daily* v. *The New York and New Haven Railroad*, 32 Conn., which is identical with the present, and where the court excluded the evidence. The silence of the reports is significant of the opinion of the profession. If, in the innumerable cases in which actions have been brought to recover damages for fatal accidents, it had been thought possible to introduce the last words of the deceased as proof of negligence, we should not have been at a loss for a guide in this instance.

It results, from what has been said, that the rule for a new trial must be made absolute. If the point were a doubtful one, we should have preferred to let the record go for review to the court above. When, however, there is a moral certainty that the judgment will be reversed, it is due to the cause of justice, and the best interests of all concerned, that the issue should be tried again while the facts are still fresh in the memory of the witnesses.

*Rule absolute.*

—*Philadelphia Legal Intelligencer.*

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## SUPREME COURT.

### The Pennsylvania Railroad Co. v. William Kerr.

A warehouse, situated near defendants' track, had been ignited by sparks emitted from a negligently placed locomotive of defendants; the burning warehouse in turn communicated fire to the plaintiff's building, distant some thirty-nine feet, destroying it. *Held:* That the proximate cause of plaintiff's loss was the burning warehouse; that the defendant's negligence was but the remote cause; and that therefore the defendant's were not liable to the plaintiff.

Error to the Common Pleas of Huntingdon County.

Opinion by Thompson, C.J. July 8th, 1870.—It has always been a matter of difficulty to judicially determine the precise point at which pecuniary accountability for the consequences of wrongful or injurious acts is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury which amounts to a limitation. It is embodied in the common law maxim, *causa proxima, non remota spectatur*—the immediate and not the remote cause is to be considered: Pars. on Cont., Vol III., p. 198, illustrates the rule aptly by the suppositive case of debtor and creditor, as follows: "A creditor's debtor has failed to meet his engagements to pay him a sum of money, by reason of which, the creditor has failed to meet his engagement, and the latter is thrown into bankruptcy and ruined. The result is plainly traceable to the failure of the former to pay as he agreed. Yet the law only requires him to pay his debt with interest. He is not held for consequences which he had no direct hand in producing and no reason to expect. The immediate cause of the creditor's bankruptcy, was his failure to pay his own debt. The cause of that cause was the failure of the debtor to pay him, but this was a remote cause, being thrown back by the interposition of the proximate cause; the non-payment by the creditor of his own debt." This, I regard, as a fair illustration of what is meant in the maxim, by the words "*proxima*" and "*remota*" See also Notes, same volume, p. 180.

In *Harrison* v. *Berkley*, 1 Strobh. S. Car. Rep. 548, Mr. Justice Wardlaw indulges in some reflections on this point worth referring to in this connection. "Every incident," says he, "will, when carefully examined, be found to be the result of combined causes; to be itself one of various causes, which produces other events. Accident or design may disturb the ordinary action of causes. It is easy to imagine some acts of trivial misconduct or slight negligence, which shall do no direct harm, but sets in motion some second agent that shall move a third, and so until the most disastrous consequences shall ensue. The first wrong-doer, unfortunate, rather than seriously blameable, cannot be made answerable for all these consequences."

It is certain that in almost ever considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensue, and so ramify as more or less to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organised society. Every one in it takes the risk of these vicissitudes Wilfulness itself cannot be reached by the civil arm of the law for all the consequences of consequences, and some sufferers necessarily remain without compensation. The case of *Scott* v. *Shepherd*, 2 Wm. Blac R. 893, the case of the squib, is sometimes cited as extending the principle of the maxim, but it is not so. The doctrine of proximate and remote causes was really not discussed in that case. One threw a squib in the market place amongst the crowd. It fell on the stall of one who immediately cast it off to prevent it exploding there, and it struck a third person and exploded, putting out his eye. The question was, whether the defendant could be made answerable in the form of action adopted, which was trespass. Chief Justice De Grey held that the first thrower, the defendant, was answerable, for that in fact the squib did the injury by the first impulse. In this way the action of trespass was sustained. It is no authority against the principle suggested. There must be a limit somewhere. Greenl. in Vol. II., s. 256, touches the question thus: "The damages to be recovered must be the natural and proximate consequence of the act complained of." This is undoubtedly the rule. The difficulty is in distinguishing what is proximate and what remote. I regard the illustration from Parsons already given, although the wrong supposed arises *ex contractu*, as clear as any that can be suggested. It is an occurrence undoubtedly frequent, that by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences, and there is a good reason for it. The second and third houses, in the case supposed, were not burned by the direct action of the match, and who knows how many agencies might have contributed to produce the result? Therefore, it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done. The text books, and, I think, the authorities, agree that such circumstances define the word "*remota*" removed, and not the immediate cause. This is also Webster's third definition of the word remote. The question which gives force to the objection that the second or third result of the first cause is remote is put by Parsons, Vol. II., 180, "did the cause alleged produce its effects without another cause intervening, or was it made to operate only through or by means of this intervening cause?" There might possibly be cases in which the causes of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable; but of these when they occur. The maxim, however, is not to be controlled by time or distance, but by the succession of events.

The case on hand is a claim against the defendant under these circumstances, briefly: A warehouse of one Simpson, situate very near the track of the company's road, was set on fire by sparks emitted from a locomotive engine of the defendants, so negligently placed as to set it on fire. The burning of the warehouse communicated fire to a hotel building situated some thirty-nine feet from the warehouse, which, at the time, was occupied by the plaintiff as tenant, and it was consumed, with its furniture, stock of liquors and provisions, and for this the plaintiff sued and recovered below. Several other disconnected buildings were burned at the same time, but this is in no way involved in this case. No doubt the company was answerable for the destruction of the warehouse, resulting from the negligence of the company's servants in the use of the engine. The authority to the company to use steam on their road does not exempt it from liability for injury resulting from the negligent use of it: *Lackawanna and Bloomsburg R. R. Co.* v. *Doak*, 2 P. F. Smith, 379. The learned judge charged that the defendant was liable to the plaintiff to the extent of his his loss, by reason of the burning of the hotel, although by fire communicated from the warehouse, if the latter was set on fire by the negligence of the defendant's servants, in the manner mentioned. To this charge the defendants excepted, and assign it for error, and this presents the question of this case.

This charge was of course the equivalent of holding, that a recovery for all the consequences of the first act of negligence of the defendants, was in law allowable. We are inclined to think in this there was error, for the reasons already given, and others that will be given. It cannot be denied but that the plaintiff's property was destroyed, but by a secondary cause, namely, the burning of the warehouse. The sparks from the locomotive did not ignite the hotel. They fired the warehouse and the warehouse fired the hotel. They were the remote cause,—the cause of the cause of the hotel being burned. As there was an intermediate agent, or cause of destruction, between the sparks and the destruction of the hotel, it is obvious that that was the proxicause of its destruction, and the negligent emission of sparks the remote cause. To hold that the act of negligence which destroyed the warehouse, destroyed the hotel, is to disregard the order of sequences entirely, and would hold good if a row of buildings a mile long had been destroyed. The cause of destruction of the last in that case, would be no more remote, within the meaning of the maxim, than that of the first, and yet how many concurring elements of destruction there might be in all of these houses, and no doubt would be, no one can tell. So to hold, would confound all legitimate ideas of cause and effect, and really expunge from the law the maxim quoted, that teaches accountability for the natural and necessary consequences of a wrongful act, and which should, in reason, be only such that the wrong-doer may be presumed to have known would flow from his act. According to the principle asserted, a spark from a steamboat, on the Delaware, might occasion the destruction of a whole square, although it never touched but a single separate structure. No one would be likely to have the least idea of such accountability, so as to govern and control his acts accordingly. A railroad terminating in a city, might, by the slightest omission on the part of one of its numerous servants, be made to account for squares burned, the consequence of a spark communicating to a single building. Were this the understanding of the extent of liability under such circumstances, it seems to me that there might be more desirable objects to invest capital in, than in the stock of such a railroad. But it never has been so understood or adjudged. Lowrie, J., in *Morrison* v *Davis & Co.*, 8 Har. 171, illustrates the argument against such liability most strikingly, by reference to a well known fact. In the case he was treating, a horse in a canal boat team was lame, in consequence of which the boat was behind time in reaching the Juniata river, and in consequence of that was overtaken by a flood in the river which destroyed the boat with its freight. The carrier, the owner of the boat, was charged with being negligent in using a lame horse, the occasion of the delay. In treating of this as only the remote cause of the disaster, the learned Judge said: "There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this little fault, one-third of a city (Pittsburgh) was destroyed; would it be right that this small act of carelessness should be charged with the whole value of the property consumed?" The answer would and ought to be: No, it was but the remote cause of it. Innumerable occasions must have occured in this commonwealth for asserting liability to the extent and upon the principle claimed here, yet we have not a solitary precedent of the kind in our books. This is worth something as proof against the alleged principle. It was Littleton's rule, "that what never was, never ought to be:" 1 Vern. 385.

The question in hand has not been adjudicated in this State, and but seldom discussed in any of the other States; yet we have a case decided in the Court of Appeals of the State of New York, in 1866, which is directly in point in support of the doctrine we have been endeavouring to advance above. It is the case of *Ryan* v. *The New York Central Railroad Co.*, (8 Tiffany,) 35 N. Y. 210. The facts in that case briefly were, that the defendant, by the carelessness of its servants, or through the insufficient condition of one of its locomotive engines, set fire to its own wood shed with a large quantity of wood therein. The plaintiff's house, situated some 130 feet from the shed, took fire from the heat and sparks of the burning shed and wood, and was entirely consumed. A number of other houses and buildings were destroyed by the spreading of the fire.

The plaintiff brought suit against the Company for his loss On the presentation of these facts at the trial, the Circuit Judge non-suited the plaintiff, and at the general term of the Supreme Court of the Fifth District, the judgment was affirmed. The case was then removed to the Court of Appeals, where the judgment was unanimously affirmed in an elaborate and exhaustive opinion by Hunt, J. Every position taken by the counsel for the defendant in error here, was taken there, and examined and answered fully in the opinion. All the English and American cases supposed to have any bearing on the point in dispute there on the same question we have here—are noticed by him, and the doctrine clearly deduced, that the railroad company was not answerable to the plaintiff for the loss of his house being burned by fire communicated by the burning shed. That case is not distinguishable in principle, or in the manner of destruction, from this. It is on all fours with this case.

But it seems to have been thought that the *Insurance Co.* v. *Tweed*, 7 Wal. (U. S. Rep.) 46, conflicts with the above case. I do not think it does, when understood. It was an action on a policy of insurance against fire, in which there was an exception of several matters, viz., invasion, insurrection, military and usurped power, *explosion*, earthquakes, &c. An explosion took place in a warehouse on the opposite side of the street from the insured property, and scattered fire and burning fragments upon the insured property and destroyed it. The decision of the Supreme Court was, that the loss was within the exception of loss by fire occasioned by explosion. To me it seems that it would have been rather more rational to have held that the destruction was by fire, *per se*. But the court interpreted the terms of the contract of the parties in this way. We must remember that there may be a difference between interpreting the obligation of a contract, and defining liability under the laws of social duty. Certain it is, the laws are not the same. One does not necessarily rule the other. I may say further, that there is no evidence, in the opinion of Mr. Justice Miller, that he had specially in view the same question, so ably discussed by Mr. Justice Hunt, or if he had, that his investigations extended so far as did those of the last-named Judge. He does not even refer to the New York case at all.

The question here involved does not seem to have been definitely determined in England; why, I am at a loss to know. There have been decisions, it is true, imposing liability against the reasons we have expressed above, but in none of them is the question of proximate and remote cause of the injury discussed at all. Such is the case in *Piggot* v. *The Eastern Counties R. R. Co.*, 54 Eng. C. L. Rep. 229, cited by the counsel for the defendant in error; and such is the recent case of *Smith* v. *The London and South-western R. R. Co.*, Law Rep., March, 1870, p. 98. In this case, Bovill, C J., and Keating, J., affirmed the recovery. Brett, J. dissented. Both these cases were before the Court of Common Pleas. I find no review of the question in the Exchequer Chamber. I regard these cases as passing over the question that was decided in the Court of Appeals in New York, and which is before us now, *sub silentio*. Hunt, J., expresses, to some extent, my experience, when he says, "I have examined the authorities cited from the Year Books, and have not overlooked the English Statutes on the subject, or the English decisions, extending back for many years. It will not be useful further to refer to the authorities, for it will be impossible to reconcile some of them with the views I have taken." I entirely agree, that if they shed any light, it is too uncertain and dim to be followed with safety; while, on the other hand, the concurrence of principle, with a just measure of responsibility, we think, is best subserved by the rule we suggest. With every desire to compensate for loss when the loser is not to blame, we know it cannot always be without transcending the boundaries of reason, and, of course, law. This we cannot do; and we fear we would be doing it, if we affirmed the judgment in this case. The limit of responsibility must lie somewhere, and we think we find it in the principle stated. If not found there, it exists nowhere. We have not been referred to any case, in any of the States and courts, excepting those noticed, and I have not myself discovered any, which, in the least militates against the foregoing views; we are therefore constrained to follow the result of our conclusions, and reverse the judgment in this case. At present we will not order a *venire de novo*, but if the plaintiff below and defendant in error desire, we will order it on grounds shown for it, if made in a reasonable time.

—*Ibid.* *Judgment reserved.*

# DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

### FOR FEBRUARY, MARCH AND APRIL, 1870.

*(Continued from page 165.)*

Action.

A lessee can maintain an action against the assignee of his assignee for the defendant's breaches of the covenant to repair in the original leases, after having paid the lessor the damages which such breaches occasioned. (Cleasby, B., *dissentiente*).—*Moule* v. *Garrett*, L. R. 5 Ex. 132.

*See* Slander; Way.

Administration.—*See* Executor and Administrator.

Agent —*See* Principal and Agent.

Agreement.—*See* Contract.

Ancient Light.

Defendant built a wall projecting at right angles to the back wall of the plaintiff's house for twelve feet, on the north. The wall was already thirty feet high, and was to be higher. The plaintiff at the same time by enlarging his own premises, was shutting off some light from the south and south-west, and was also opening new lights in addition to the ancient ones which he maintained. *Held*, that he was entitled to an injunction.—*Staight* v. *Burn*, L. R. 5 Ch. 163.

Annuity.—*See* Forfeiture; Novation, 1; Security, 2.

Assignment.—*See* Action; Fraudulent Conveyance; Security, 2.

Assumpsit.—*See* Husband and Wife, 1; Insurance, 4.

Attorney.—*See* Limitations, Statute of, 2; Solicitor.

Bailment.—*See* Carrier.

Bankruptcy.

1. The English Bankruptcy Act of 1861 is made applicable to "all debtors, whether traders or not." A person having privilege of parliament, and not a trader, was held not exempt from their operation.—*Ex parte Morris. In re Duke of Newcastle*, L. R. 5 Ch. 172.

2. A drawer of a bill of exchange, who has taken it up after an act of bankruptcy committed by the acceptor, but before adjudication, has a debt, on the strength of which he may petition for adjudication against the acceptor.—*Ex parte Cyrus*, L. R. 5 Ch. 176.

*See* Costs; Forfeiture; Inspection of Documents; Mortgage, 1; Power, 1; Sheriff; Winding Up.

Bills and Notes.

1. To an action by the payee against the drawer of a bill for the accommodation of the acceptor, the defendant pleaded an agreement made at the time of the delivery of the bill, between the plaintiff, defendant and acceptor, that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff for the due payment of the bill, and that until these should be sold, and the proceeds applied, the defendant should not be liable to be sued upon the bill; and that the acceptor deposited the securities with the plaintiff, but that the plaintiff had not sold, but still held them. *Held* (Willes, J., *dubitante*), that oral evidence of this agreement was inadmissible, as tending to vary the written contract.—*Abrey* v. *Crux*, L. R. 5 C. R. 37.

2. After B. had paid one bill, of which M. was the holder, and to which B.'s signature had been forged as acceptor, M. sued B. on another similar bill. The acceptance was not written, authorized or adopted by B., nor did B. know that M. had held the former bill, or lead M. to believe that the acceptance sued on was B.'s. *Held*, that B. was not estopped to deny that the bill sued on was accepted by him, by having paid the other, and that the judge was not bound to rule that M. was entitled to a verdict as a matter of law.—*Morris* v. *Bethell*, L. R. 5 C. P. 47.

3. A bill drawn by A., accepted by B., indorsed to C., and by C. indorsed to D., was dishonored at maturity. The next morning D., not knowing A.'s address, applied to C. for it, and, C. then being from home, called again at 5½ p. m., got the address, and, after 6, sent A. notice of dishonor. It was not received that night, as it would have been if posted before six. All the parties lived in London. D. sued A., and the jury found that he had used reasonable diligence in forwarding the notice. The court refused to disturb a verdict for the plaintiff.—*Gladwell* v. *Turner*, L. R. 5 Ex. 59.

*See* Bankruptcy, 2; Consideration; Damages, 2.

Burden of Proof.—*See* Death.

Carrier.

The plaintiff was induced by the fraud of A. to send goods by defendants' line to the Z. Company (which had in fact ceased to carry on business), at a certain address. The goods were tendered there and refused. The defendants then addressed a notice to the Z. Company, that they held the goods to their order, subject to warehouse charges, and asking directions. A. afterwards produced this note, and a delivery order signed by A. for the Company, and obtained the goods. The same thing happened a second time, except that no notice was sent. It was left to the jury whether the defendants had acted reasonably and without negligence as to the goods, and in delivering them to A. *Held*, that a verdict for the defendant should not be disturbed.—*Heugh* v. *London & North-Western Railway Co.*, L. R. 5 Ex. 51.

*See* Public Exhibition; Railway.

Cesser.—*See* Forfeiture.

Charity.—*See* Limitations, Statute of, 8.

Commission.—*See* Surveyor.

Common Carrier.—*See* Carrier.

Common, Tenancy in.—*See* Injunction, 2.

Company.

1. P. signed the memorandum of association of a company for 1,350 shares, and F. and J. for 50 shares each. P. sold a business to the company, to be paid for in part by 1,500 paid-up shares. By P.'s directions, 50 of these shares were alotted to F., and 50 to J. *Held*, that this did not satisfy F.'s and J.'s subscriptions.—*Forbes & Judd's Case*, L. R. 5 Ch. 27.

2. The agent of a company, being requested to take shares in it, offered to apply for 100,

if all moneys which might be payable in respect of them might be deducted from his commission. The manager of the company told him that he would be "allowed the privilege of paying them up as convenient;" whereupon he took the shares, and was registered as holder, but never paid any money on them, or received any dividends. He also signed and sent to the manager a proxy paper, but wrote to him that it was on condition that he did not thereby cancel the agreement to allow him to pay calls for commissions. He attended two meetings. His commission was not sufficient to pay for the shares. *Held*, that he was liable as a contributory. The above agreement was not a condition to the subscription, but was collateral. Also, having held himself out as a shareholder, to induce others to take shares, he was precluded, as against them, from denying it.—*Bridger's Case*, L R. 9 Eq. 74

3. When a shareholder, who has notice of misrepresentations of the company, which entitle him to avoid his subscription, says nothing, but stands by, while he sees other shareholders bringing suit for relief on like grounds, he cannot long afterwards elect to avoid his contract.—*Ashley's Case*, L. R. 9 Eq. 268.

4. A. owned shares in Railway Company X., and also stock in Company Z. He gave his address at B.'s bank to X Co., and at a club to Z. Co. B., who had charge of the certificates, fraudulently sold them, and forged transfer deeds. X. Co. and Z. Co. wrote to A., informing him of the transfers (X. Co. receiving no answer, Z. Co. receiving one forged by B.), and then registered the transfers, and delivered new certificates. On bills against X. Co. and Z. Co. and the purchasers: *held*, that A. was entitled to delivery up of the certificates, to have the transfers cancelled, and to have dividends then or thereafter to be due, but without costs. Decree without prejudice to any question at law or in equity between the co-defendants.—*Johnston* v. *Renton*, L. R. 9 Eq. 181.

5. The broker of a bank, by order of the directors, bought shares in the same, to be taken by the directors of the company, and was credited for the price paid by him in his banking account, kept with the same bank. The bank was afterwards wound up. *Held*, that, although the transaction was *ultra vires* of the directors, the broker was to be allowed the item of the above credit in the balance for which he proved.—*Zulueta's Claim*, L. R. 9 Eq. 270.

*See* Damages; Novatim; Privileged communication; Winding up, 4.

Compensation.—*See* Notice.

Compound Interest.—*See* Limitations, Statute of, 2.

Compromise.—*See* Husband and Wife, 5.

Condition.—*See* Company, 2; Forfeiture.

Conditional Limitation.—*See* Forfeiture.

Consideration.

A. gave a note for £520 on demand, with interest, to B. Afterwards B. signed an agreement that the £520 should be repaid at £25 each quarter, with interest. In a suit by B.'s administratrix for the £520, *held*, that the agreement was without consideration, and no defence.—*McHanus* v. *Bark*, L. R. 5 Ex. 65.

*See* Voluntary Conveyance.

Construction.—*See* Bankruptcy, 1; Covenant; Damages, 1; Guaranty; Infant; Insurance, 2, 3; Marriage Settlement; Novation, 3; Patent, 3; Power, 1, 2, 3; Sheriff; Ship; Statute; Will, 3–6, 8–12.

Contract.—*See* Action; Bills and Notes, 1; Company, 1–3; Consideration; Guaranty; Husband and Wife, 1–3; Interest; Limitations, Statute of; Mortgage, 1; Novation; Parties; Public Exhibition; Restraint of Trade; Security; Trust.

Contributory.—*See* Company, 3.

Conversion.—*See* Legacy Duty.

Copyright.

1. The proprietor of a newspaper has, without registration under the Copyright Act, such a property in its contents as will entitle him to sue in respect of a piracy. But the piracy of "a list of hounds" is not a case for an interlocutory injunction, as a correct list is easily got, and it is liable to frequent changes. —*Cox* v. *Land and Water Journal Co.*, L. R. 9 Eq. 324.

2. Plaintiff wrote an essay for the "Welsh Eisteddfod," to prove that the English are the descendants of the ancient Britons, which he published. Defendant afterwards did the like. His book was like plaintiff's in theory, arrangement, and, to a great degree, in the citation of authorities. The latter facts were explained by both parties having taken their references from Pritchard, and the theory by the occasion of writing. Two authorities were seemingly taken from the plaintiff, and certain results were based upon his tables. The writing was the defendant's. *Held* (reversing the decision of James, V. C., on the facts), the plaintiff was not entitled to an injunction.

Defendant had a right to take authorities even though sent there by plaintiff's book, which took the same.

An author has no monopoly in a theory propounded by him.

*Per* James, V. C. In cases of literary piracy, the defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's.—*Pike* v. *Nicholas*, L. R. 5 Ch. 251.

3. Although a rival publisher is not justified in copying slips cut from a Directory previously published by another party by having sent out canvassers to verify them, and to obtain the leave of those whose names were on the slips to publish them in that form, he may use such slips to direct his canvassers where to go for the purpose of obtaining the addresses anew.—*Morris* v. *Wright*, L. R. 5 Ch. 179.

Corporation.—*See* Company.

Costs.

1. A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy, or after the registration of a composition deed executed by him.—*Bowyer* v. *Griffin*, L. R. 9 Eq. 340.

2. When an executor, who pays a particular fund into court under the Trustee Relief Act, has in his hands the general residuary estate, the court has jurisdiction to order him to pay out of the residue the costs of proceedings relating to the particular fund.—*In re Trick's Trusts*, L. R. 5 Ch. 170.

3. One who moves for leave to inspect documents without applying to the party in possession of them, must pay costs.—*The Memphis*, L. R. 3 Adm. & Ecc. 23.

4. To a suit for restitution of conjugal rights, the wife replied cruelty, &c., but abandoned the charges at the hearing. A decree was made against her, but could not be served, as she was out of the jurisdiction. On proof that the wife had a separate income of £760, the court ordered that she should pay the costs of the proceedings.—*Miller* v. *Miller*, L. R. 2 P. & D 13.

5. Although a man having no defence enters no appearance to a suit for dissolution of marriage, he may attend before the registrar on the taxation of his wife's costs.—*Letts* v. *Letts*, L. R. 2 P. & D. 16.

*See* Husband and Wife, 4; Pleading, 2; Solicitors; Statute; Surveyor.

Covenant.

A. covenanted on the marriage of his daughter B., that if B. should survive him, or, dying, leave any children or issue, A. would devise or otherwise settle an equal part with A.'s other children, of the property A. should have at his death, to the use of B.'s husband for life, then to B for life, then to the children of the marriage with a clause of survivorship and accruer in the event of children dying under twenty-one without issue. The children of B.'s marriage all died without issue before A., only one of them, C., having attained twenty-one. B. survived A. A.'s will followed the covenant, but did not protect the interest of such of B.'s children as reached twenty-one from lapse. *Held*, that A. was not bound to do so, and that C.'s representatives took nothing.—*In re Brookman's Trust*, L. R. 5 Ch. 182.

*See* Action; Limitations, Statute of, 1; Marriage Settlement; Trust.

Creditor.—*See* Security.

Criminal Law.—*See* Embezzlement; Indictment; Infant.

Crown.—*See* Fishery.

Cruelty.

Force, whether physical or moral, systematically exerted to compel the submission of a wife, in such a manner, to such a degree, and during such a length of time, as to injure her health and render a serious malady imminent, is legal cruelty.—*Kelly* v. *Kelly*, L. R. 2 P. & D. 31.

Damages.

1. By the articles of association of a company, L. was to be manager, and if he should be "at any time deprived of or removed from his office for any other cause than gross misconduct, the directors shall pay to him as compensation for loss of office" a certain sum, "within one month from the time of such removal." The company was ordered to be wound up. *Held*, that this event entitled L. to said sum, and that he could prove for the whole sum without any deduction on the ground that L. might get another appointment.—*In re London & Scottish Bank*, L. R. 9 Eq. 149.

2. Defendants at L. undertook by a letter of credit to accept bills for plaintiffs at A., plaintiffs to provide funds to meet the bills before maturity. Defendants, after having accepted bills for which plaintiffs had provided funds, stopped, and notified plaintiffs that they could not pay. In action on the letter of credit: *Held*, that expenses of necessary telegraphing from A. to L., of protesting the bills, and commissions paid for taking up the bills at L.,

could be recovered.—*Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 92.

3. When a sale of real estate goes off through the fault of the vendor, the purchaser can recover the expense of investigating the title.—*Frend* v. *Buckley*, L. R. 5 Q. B. 218.

*See* Copyright, 2; Negligence; Notice.

Death.

Those who found a right upon the fact that a person, who has not been heard of for seven years, survived a particular period, must establish that fact affirmatively by evidence.

A., a testator, died January 5, 1861, and left a residue to his nephews. The last that was known of B., one of his nephews, was that he was entered in the books of the American Navy as having deserted June 16, 1860, while on leave. *Held*, that B. was not shown to have survived A., and that his personal representatives could not claim a share under A.'s will.—*In re Phené's Trusts*, L. R. 5 Ch. 139.

Debtor and Creditor.—*See* Bankruptcy, 2.

Desertion.

A wife, who, after her husband has deserted her, but within the statutory time, becomes a party to a deed by which she agrees to live apart from him, and he agrees to pay her an allowance, although she has never been paid the allowance, can no longer establish the desertion.—*Parkinson* v. *Parkinson*, L. R. 2 P. & D. 25.

Devise.—*See* Covenant; Limitations, Statute of, 3; Will, 6–12.

Divorce.—*See* Cruelty; Desertion.

Dower.

A mother entitled to dower in land of an infant, which was taken by a railway company, and the value paid into court under the Lands Clauses Act, was held entitled to be paid the value of her right of dower out of the *corpus* of the fund, instead of receiving one-third of the dividends for life.—*In re Hall's Estate*, L. R. 9 Eq. 179.

Easement.—*See* Ancient Light.

Election.—*See* Company, 3.

Embezzlement.

The officer of a friendly society may now be punished for embezzling their money, although some of their rules are in restraint of trade.—*The Queen* v. *Stainer*, L. R. 1 C. C. 230.

Equitable Conversion.—*See* Legacy Duty.

Equitable Mortgage.—*See* Mortgage, 1.

Equity.—*See* Husband and Wife, 1; Power, 1; Solicitor.

Equity Pleading and Practice.

1. A married woman cannot present a petition of appeal without a next friend, although another person joins in the petition, and the suit relates to her separate estate.—*Picard* v. *Hine*, L. R. 5 Ch. 274.

2. A married woman, administratrix, filed a bill against an accounting party to the estate of the intestate, by her next friend, and made her husband a co-defendant. The other defendant not having demurred, as he might have done, and not taking the objection till the hearing, an amendment was allowed making the husband a co-plaintiff.—*Burdick* v. *Garrick*, L. R. 5 Ch. 233.

*See* Costs, 1, 2; Husband and Wife, 4, 5; Inspection of Documents; Parties; Trust.

Estoppel.—*See* Bills and Notes, 2; Company, 2, 3.

Evidence.—*See* Bills and Notes, 1; Death; Pleading, 1; Privileged Communication; Railway, 3; Slander; Will, 5

Executor and Administrator.

1. The payment of one legacy by executors out of their own money, as a gratuity, is not an admission of assets for the payment of others. Neither is a payment out of the estate of one of two executors who were also residuary legatees, by his representatives, to the survivor in compromise of his claim as such residuary legatee. (*See* Limitations, Statute of.)—*Cadbury* v. *Smith*, L. R. 9 Eq. 37.

2. Executors before probate directed A., the manager of the testatrix's chemical works, to continue to manage them, which he did. Goods of the testatrix thus in A.'s hands as agent of the executors were seized on *fi. fa.* on the ground that he was executor *de son tort*. The executors afterwards proved the will. *Held*, that A. was not executor *de son tort*.—*Sykes* v. *Sykes*, L. R. 5 C. P. 113.

*See* Costs, 2; Equity Pleading and Practice, 2; Limitations, Statute of, 2, 3; Will, 5.

Executor de son tort.—*See* Executor and Administrator, 2.

Executory Devise.—*See* Forfeiture.

Fine.—*See* Power, 1.

Fishery.

A forfeiture of "liberties and free usages' does not include a several fishery. (*Per* Kelly, C. B., and Pigott, B)

Such a fishery, if resumed by the crown, does not merge in the royal prerogative, so as not to be regrantable.—*Duke of Northumberland* v. *Houghton*, L. R. 5 Ex. 127.

Fixtures.

Trade fixtures, which are annexed to a building by bolts and screws for the single purpose of steadying them when in use, and which can be removed without injury to the freehold, pass to the mortgagee under a previous equitable mortgage.—*Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

*See* Mortgage, 1.

Forfeiture.

A clause of forfeiture of an annuity, on bankruptcy or alienation, does not operate when the bankruptcy is annulled before the first payment becomes due.—*Trappes* v. *Meredith*, L. R. 9 Eq. 229.

Forgery.—*See* Bills and Notes, 2.

Franchise.—*See* Fishery.

Fraud. — *See* Company, 2, 4; Injunction; Power, 4, 5.

Fraudulent Conveyance.

A. made a voluntary assignment of a policy on his own life, without any intent to defraud creditors. In the event, however, prior creditors were delayed in getting paid. Then a subsequent creditor sued to set the conveyance aside. *Held*, on authority (3 De G. J. & Sm 293; 3 Drew. 419), rather than on reason, that he could, under St. 13 Eliz. c. 5.—*Freeman* v. *Pope*, L. R. 9 Eq. 206.

Freight.—*See* Insurance, 1, 2.

Friendly Society.—*See* Embezzlement.

General Average.

A ship, while still in port, was driven ashore, and in order to get her off the cargo was unshipped, landed, and warehoused, under the superintendence and control of the ship-owner's agents. After one unsuccessful attempt, the vessel was floated, and was taken into port and repaired. The cargo was then reshipped and the voyage completed. *Held*, that the owners of the cargo were not bound to contribute to the expenses of getting the vessel off, as general average. (Exch. Ch.)—*Walthew* v. *Mavrojani*, L. R. 5 Ex. 116.

Gift.—*See* Voluntary Conveyance.

Guaranty.

A., being liable to B. on an existing guaranty for £2,200 and for £1,500 on two bills, signed this agreement: "Whereas C. is . . . indebted to you in the sum of £2,205, &c., . . . I do, . . . in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, and agree to become responsible for, any sum of money for the time being due from the said C. to you, whether in addition to the said sum of £2,205 or no." Former guaranties used the words "amount for the time being due," to signify indefinite sums to become due thereafter. *Held*, that this guaranty was unlimited in time and amount.—*Coles* v. *Pack*, L. R. 5 C. P. 65.

*See* Novation, 3.

Highway.—*See* Way.

Husband and Wife.

1. Money advanced for, and applied to, the support of a married woman who has been deserted and left without support by her husband, may be recovered of him in equity.—*Deare* v. *Soutten*, L. R. 9 Eq. 151.

2. B., the wife of A., a lunatic, ordered necessary repairs for a house in which B. lived, and which A. had covenanted in his lease to keep in repair. B. received out of A.'s income and other sources money sufficient for all purposes, including repairs. *Held*, that A. was not liable for them.—*Richardson* v. *Du Bois*, L. R. 5 Q. B. 51.

3. When a married woman, living separate from her husband, contracts a debt which she can only satisfy out of her separate estate, that estate will be liable for it in equity.—*Picard* v. *Hine*, L. R. 5 Ch. 274.

4. A., a married woman, who was entitled to the income of property held on trust for her separate use, without power of anticipation, joined with her husband in a power of attorney to B. to receive and sue for any moneys due to them or either of them. B. demanded payment of A.'s separate income from the trustee, and, being refused, began a useless administration suit in A.'s name, acting as next friend, without consulting A. *Held*, that the power was a nullity, the suit unauthorized, and that B. should pay all the costs.—*Kenrick* v. *Wood*, L. R. 9 Eq. 333.

5. The court has jurisdiction to sanction, on behalf of a married woman, a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest.

Upon a petition to that effect, the married woman should appear separately from her husband.—*Wall* v. *Rogers*, L. R. 9 Eq. 58.

*See* Costs, 4; Cruelty; Desertion; Equity Pleading and Practice; Will, 7.

Illegal Contract.—*See* Restraint of Trade.

Indictment.

An indictment charged A. with having made a false declaration before a justice that he had lost a pawnbroker's ticket, whereas he had not lost the said ticket, but "had sold, lent or deposited it" with one C., as A. well knew. *Held*, that the indictment was not bad for uncertainty, as the words quoted were surplusage.—*McQueen* v. *Parker*, L. R. 1 C. C. 225.

INFANT.

A., the mother of a child five weeks old, and B., put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton wool. A then, with the connivance of B, took the hamper to M., four or five miles off, and gave it to the clerk of a railway station there, told him to be very careful of it, and to send it to C., by the next train, which would leave in ten minutes, and paid for the carriage. A. did not tell the clerk the contents of the hamper, which was addressed to C. "with care; to be delivered immediately." The train left M. at 7.45 p m., and the hamper was delivered to C. at 8.40 p.m. The child died three weeks afterwards from other causes. *Held* (by a majority of the fifteen judges), that A. and B. were properly convicted of "abandoning and exposing" the child, "whereby the life of the said child was endangered," under 24 & 25 Vic c. 100, sec. 27.—*The Queen* v. *Falkingham*, L. R. 1 C. C. 222.

INJUNCTION.

1. Plaintiff had an established business in Pall Mall, under the name of the "Guinea Coal Company." In March, 1869, defendant set up a business under the name of "Pall Mall Guinea Coal Company," in the Strand, and in August moved into Pall Mall. Nov. 24, plaintiff, finding that his customers were misled, filed a bill to restrain defendant from using any name which was a colorable imitation of his own. An injunction against the use of the name "Pall Mall Guinea Coal Company," in Pall Mall, was upheld to prevent a fraud on the plaintiff, although there were other Guinea coal companies. There had been no undue delay. *Semble*, if it had been proved, as alleged, that plaintiff was wont to sell short weight or inferior coal under a good name, the injunction would have been refused.—*Lee* v. *Haley*, L. R. 5 Ch. 155.

2. After a decree for sale in a partition suit, a defendant who occupied the property proposed to sell the hay and turnips from off the land. This was contrary to the custom of the country as between landlord and tenant, but the defendant was not in that relation. An injunction was refused. The proposed act was no tort.—*Bailey* v. *Hobson*, L. R. 5 Ch. 180.

*See* ANCIENT LIGHTS; COPYRIGHT; RESTRAINT OF TRADE.

INSANITY.—*See* HUSBAND AND WIFE, 2.

INSOLVENCY.—*See* WINDING UP.

INSPECTION OF DOCUMENTS.

L., in a suit against his former partners, obtained an order for production of the books, with leave to inspect. L. became bankrupt, and B., his assignee, revived the suit, and applied for the benefit of the order. The books were very voluminous, and the accounts were kept in Indian currency. *Held*, that B. might have the benefit of the order, and take in L. as accountant. Later, it was further *held* that L., if accompanied by a duly authorised clerk of B.'s solicitors' firm, was at liberty to inspect.—*Lindsay* v. *Galdstone*, L. R. 9 Eq. 132.

*See* COSTS, 8; PRIVILEGED COMMUNICATION; VENDOR AND PURCHASER OF REAL ESTATE.

INSURANCE.

1. The plaintiff chartered his ship Z., now at A., for a voyage from B. to C; the ship to be at B. by a certain date, or the charterer to have the option of declaring the charter void Afterwards plaintiff effected an insurance upon Z., from A. to B., and thence to C., on freight chartered or otherwise, with liberty to sail to, &c., any ports whatsoever, without prejudice. The ship sailed from A., in ballast, for B., but suffered a constructive total loss before getting there. *Held*, that the interest in the freight on the charter from B. to C. had attached, although the plaintiff was not bound to have sailed direct from A. to B. had he chosen otherwise.—*Barber* v. *Fleming*, L. R. 5 Q. B. 59.

2. A vessel previously chartered for a voyage from A. to B. was chartered to proceed on her present voyage to B., and having discharged her cargo there, to go to C. for rice, and thence, &c. Insurance was obtained "at and from" B. to rice ports, and thence, &c., on chartered freight. The vessel was lost at B. before the cargo of the voyage thither was discharged. *Held*, that the assured could recover on the policy. (Exch. Ch.)—*Foley* v. *United Fire & Marine Insurance Co.*, L. R. 5 C. P. 155.

3. The risk in a policy on a ship was described in writing to be "at and from L. to C, and for thirty days after arrival," and then followed the usual printed words "upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety." The vessel arrived at C. so damaged as to require constant pumping to keep her afloat, and with her steering apparatus badly out of gear. The currents, &c, at C. are dangerous, especially to vessels with steering apparatus out of order. The vessel was securely moored Oct. 28. Her cargo was safely unloaded by Nov. 8, and the water became entirely under

command of the ship's pumps. On the 12th she was taken to a dry dock for survey and repairs, and was there destroyed by an accidental fire on the 5th of December. *Held*, that the risk had terminated at the time of loss. The vessel had moored twenty-four hours "in good safety," and the loss was more than thirty days even from the end of that time.—*Lidgett* v. *Secretan*, L. R. 5 C. P. 190.

4. A policy of insurance was effected for £6000 on the ship H., valued at £6000. The H. was run down and sunk by another ship, and the underwriters paid the owners the £6000 as for a total loss. Afterwards £5000 was recovered in the Admiralty in respect of the H. against the owners of the other ship. The H. was not further insured, and was worth £9000. *Held*, that the underwriters were entitled to the £5000 damages, the valuation being conclusive between them and the assured.—*North of England Insurance Association* v. *Armstrong*, L. R. 5 Q. B. 244.

*See* Novation, 2, 3; Security.

Interest.

A. agreed to buy land for £38,500, with interest at five per cent. until payment, and he was let into possession. Difficulties having arisen in completing the purchase, A. paid £38,000 into a bank to a separate account, and gave notice to the vendors that he had done so, and would not pay interest until the contract. The vendors replied that they disputed the sufficiency of the notice, but did not point out that the sum fell short £500. A., on discovering the fact, paid in £500, with interest at five per cent. *Held*, that A. was not liable for interest after the time of paying the £38,000 into the bank.—*Kershaw* v. *Kershaw*, L. R. 9 Eq. 56.

*See* Winding Up, 1.

Jurisdiction.—*See* Costs, 2; Power, 1.

Laches.—*See* Company, 3; Injunction, 1.

Landlord and Tenant.—*See* Action; Notice.

Lease.—*See* Action; Notice; Power, 1; Vendor and Purchaser of Real Estate.

Legacy.—*See* Covenant; Executor and Administrator, 1; Limitations, Statute of, 3; Power, 3; Will, 6–12.

Legacy Duty.

Under a will, the income of a fund directed to be laid out in real estate was paid to A. for life, then to B. for life, and then by the will the fund became absolutely due to C., the heir of the testator, who refused to receive either income or principal. The fund, which had never been laid out in land, was now payable to the heir of C. *Held*, that duty was payable under the Legacy Duty Act (36 Geo. III. c. 52). (Exch. Ch.)—*Re DeLancey*, L. R. 5 Ex. 102; s. c. L. R. 4 Ex. 345. *Ante*, p. 473.

Letter of Credit.—*See* Damages, 2.

Libel.

Libel. Plea, that defendant, in the ordinary course of his military duty, as the superior officer of the plaintiff, and because it was his duty, and not for any other reason, forwarded letters of the plaintiff complaining of an order given by defendant, and for the information of the commander-in-chief, accompanied the letters with a report on the subject of complaint and on the incompetency of the plaintiff, addressed to the proper officer, and on a proper occasion, which was the libel complained of. Replication, that the libel was written by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of the defendant's duty as such superior officer. Demurrer. *Held* (Cockburn, C. J., *dissentiente*), that the replication was bad. Words written by a military officer, in the ordinary course of his duty as such, are absolutely privileged in the civil courts.—*Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94.

Lights.—*See* Ancient Lights.

Limitations, Statute of.

1. A postnuptial settlement made in 1814, in pursuance of an antenuptial agreement, recited that A., the settlor, had paid £1000 to B., and B. therein covenanted with A. that he would hold the £1000 upon trust, "with the approbation of" A., to "invest the same . . . in the public funds, or . . . government or real securities," in the names of A. and B., for the benefit of A. and his wife during their respective lives, and then for their children. And A. covenanted to pay to B. £1000 more twelve months from date, to be held on like trusts. B. died in 1821, and A. died after his wife in 1868. Neither the sum of £1000 was really paid to B., or invested in the names of A. and B. *Held*, on a claim by the children to rank as creditors, that A. had made himself trustee as to the first £1000, and the Statute of Limitations was no bar; but the claim to the second £1000 rested in covenant, and was barred.—*Stone* v. *Stone*, L. R. 5 C. 74.

2. A., a London solicitor, held a power of attorney from B., his principal in America, to sell his property and invest the proceeds in B.'s name, or in trust for him. A. received moneys under the power in 1859, which he

paid into his firm's general bank account. B. died intestate the same year. In 1867. B.'s widow took out administration to his estate, and in 1868 filed a bill against A. for an account. *Held*, that the Statute of Limitations was no bar, because A. held the moneys on a direct trust, and if he had not, the statute would not have begun to run till administration was taken out. But the mere fact that the money was mixed with the solicitor's general account did not make him liable for compound interest —*Burdick* v. *Garrick*, L. R. 5 Ch. 233.

8. A. left real and personal estate upon trust, to convert the same, and pay the income to B. for life, and then to pay the fund as B. should appoint. B., by will, appointed the fund to her executors, who were her residuary legatees, and also trustees under A.'s will, upon trust, to pay certain charitable legacies, including £1000 to X. Hospital. Thirty years after B.'s death, a bill was filed for the payment of this sum. There had been no admission of assets (see Executor and Administrator), and no sum set apart. *Held*, that there was no trust, and the statute was a bar, although the legatees did not know of the legacy, or that the will was proved.—*Cadbury* v. *Smith*, L. R. 9 Eq. 87.

*See* Statute.

Lunatic.—*See* Husband and Wife, 2.

## GENERAL CORRESPONDENCE.

### *Form of indictment.*

To the Editors of the Law Journal.

Gentlemen,—As in the interests of "the profession" you invite reports of cases decided in our local Courts, I beg to transmit you the following. I feel it would be extreme arrogance on my part to make any remarks thereon. It sufficiently commends itself to the notice of the profession.

At the last General Sessions of the Peace for a Western County a person was committed for trial for a misdemeanour, in obstructing a public highway; a true bill was found against him at the last Assizes. The indictment was drawn by an eminent Queen's Counsel, and was this:—

County of ——, } "The jurors for Our Lady
*To wit:* } the Queen, &c. . . . . (*reciting as usual the existence of the highway, its situation, &c., and its being used as such*) until on the first day of April in the year of our Lord one thousand eight hundred and seventy one J—— B—— did unlawfully and injuriously build and construct a fence with rails &c." . . . .

On the arraignment of the defendant he pleaded not guilty. His learned counsel thereupon moved to quash the indictment on the ground that the offence was charged to have been committed in 1871. The Crown Attorney urged the absurdity of such an objection, and shewed that the "one" must be taken in connection with J—— B——, and that it was not 1871, but "one J—— B——."

The learned Chairman, however, sustained the objection, and delivered the following judgment: "*As offence is charged to have been committed in* 1871, *we quash the indictment.*"

I give this judgment to the legal profession for their attentive consideration, and if, by the publication and perusal thereof, the Attorney General will be induced to be more careful in future in selecting competent Queen's Counsel to conduct Crown business, and in a proper manner make timely recognition of the services of this judge—this legal "gem of purest ray serene"—my services as reporter will be amply repaid.

Yours, &c., K.

Chatham, June 18th, 1870.

Santee v. Santee.—A testator bequeathed the interest of $1,000 to his widow for life, and also certain specific articles, as hay, wheat, &c., to be paid by the devisee of a tract of his land "during her life," and also the occupancy of certain rooms in his dwelling-house "during her lifetime or so long as she may choose to occupy the same herself." The devisee of the land gave the widow his bond conditioned for the payment of the interest and specific articles at the times they became due. *Held*: 1. That the widow's right to the receipt of the interest money, and the hay, &c., was not limited to the time of her occupancy of the rooms in the homestead. 2. That where the time of delivery and the particular articles to be delivered are fixed by contract, it is the duty of the obligor to seek the obligee to make the delivery. 3. If the obligee is out of the commonwealth, but his whereabouts is known to the obligor, then, although the latter is not obliged to follow him out of the State, yet it is his duty to inquire by letter as to what reasonable place he will appoint at which to receive the goods.—*Philadelphia Legal Gazette.*

In a suit for divorce recently tried before Judge Patchen, of Detroit, it was decided that a farm should be equally divided between the severed couple, on the ground that the woman, by her hard work, had done as much as the man to acquire the property.

## DIARY FOR AUGUST.

1. Mon. *Lammas.*
7. SUN. *8th Sunday after Trinity.*
13. Sat.. Last day for County Clerks to certify County rates to Municipalities and Counties.
14. SUN. *9th Sunday after Trinity.*
18. Thur. Last day for setting down and giving notice for re-hearing.
21. SUN. *10th Sunday after Trinity.* Long Vacation ends.
24. Wed. *St. Bartholomew.*
25. Thur. Re-hearing Term in Chancery commences.
28. SUN. *11th Sunday after Trinity.*
29. Mon. County Court (York) Term begins.

# THE Canada Law Journal.

## AUGUST, 1870.

### THE DOMINION ARBITRATION.

The report of the proceedings on this important matter, which we publish in other columns, will be read with interest, not altogether for its intrinsic value as a decision upon a point which is new in this country, but more as a history of the case in its legal aspect.

As to the merits of the case, we have nothing to do, but as to the main legal point, whether the arbitration could proceed without all the arbitrators being unanimous, it is conceded that if it were merely a private arbitration there would be no room for doubt, but, as it is unquestionably of a public nature, it is contended that that fact makes all the difference and obviates the necessity of unanimity amongst the arbitrators. The majority of the authorities and those most in point are American, though there are English cases which seem to admit the principle contended for, bear out the contention.

It seems reasonable to look upon the arbitrators appointed under the provisions of the British North America Act, 1867, in the nature of a court ordained for a special purpose, and if a court, then clearly the majority rule.

It is true that the statute speaks of the "arbitrators;" but the mere use of that word does not necessarily prevent their being in reality something more than mere private arbitrators, and subject to the rule of law applicable to such; and the whole scope and tenor of the British North America Act, 1867, shews that something more was intended—and it may be remarked that even Judge Day does not appear to have expressed an opinion adverse to his co-arbitrators on this point.

We can scarcely imagine what the government of Quebec expected to take by the writ of prohibition which was issued from one of the courts of that Province, returnable next month, except it is desired to force the case to England for a final decision, and this would seem to be the object aimed at, though we doubt if that object will be attained, or if attained, that the result will be satisfactory to the promoters of the writ.

The objection that Col. Gray is a resident of Ontario, and therefore ineligible (when in fact he was a resident of New Brunswick when appointed, and moved to Ottawa to attend to his public duties), seems so feeble, not to say childish, as to betoken a weakness which cannot but damage the case of the Quebec government, both in a political and legal point of view.

The result of these proceedings will be looked for with much interest, whether viewed as a mere question of law on the point of unanimity, or on account of the large amounts at stake, the political bearing of the case, or the important constitutional questions involved.

### LIABILITY FOR ACCIDENTS.

We have read with much interest a pamphlet sent to us some time since on "The Evils of the Unlimited Liability of Masters and Railway Companies for Accidents arising from the negligence of Servants, especially since Lord Campbell's Act." The paper is written by Joseph Brown, Esq., Q.C., and was read before the Social Science Association.

The view most favorable to masters and railway companies is advocated very strongly and very ably, but we cannot but feel that the zeal of the writer in the cause he upholds has led him into enunciating some opinions which can scarcely be sustained.

One evil that he complains of is—"the great number of such actions and the length of time which the trial of them occupies, to the hindrance and delay of commercial and other important business"—is certainly not felt in this country as such a hardship as requires any serious consideration.

There is however, much truth in the following remarks:—

"The great evils, however, which I have mentioned, serious as they are, are not those to which I have undertaken to call the attention of the Society. The great and crying evil belonging to the class of actions in question is this—that the penalty of the act of negligence, even when it is proved ever so clearly, almost always falls on one who is perfectly innocent of any blame. A servant carelessly drives a cart over the plaintiff and breaks his leg; but the servant can't pay anything—his master can—therefore the law makes the master pay the damages. Of course the servant in ninety-nine cases out of a hundred is wholly unable to repay his master. The result is that the master is punished, and the servant who did the mischief goes scot free."

But his language is, it seems to us, extravagant when he says:—

"If a tradesman who has saved £10,000 by a life of industry and frugality, sets up a brougham, and his coachman happens in a moment of carelessness to drive over and kill a merchant who is making £2,000 a-year, the master may be mulcted of his whole fortune in damages, though he was entirely blameless."

He argues that the rule *respondeat superior* is only applicable with justice where the servant has followed his master's orders in doing the very act complained of, and that it ought never to be applied where the act done is beyond or contrary to orders; and in support of his contention he calls in the analogy of the criminal law, and cites the institutes of Menu, "the oldest system of law known to us," where it is laid down that,—

"'Where a carriage has been overturned by the unskilfulness of the driver, then, in case of any hurt, the master shall be fined 200 panas; that if the driver shall be skilful but negligent the driver alone shall be fined, and those in the carriage shall be fined each 100, if the driver be clearly unskilful.'"*

He continues: "The rule which thus approved itself to the mind of the Indian lawgiver 3,000 years ago, rests upon the immutable distinction of justice and reason, that in the one case the master is to blame, and in the other he is not. He must of necessity employ servants to do a multitude of things which he can't do himself; he does his best to employ skilful and careful servants; this is all he can do, and, when he has done it, to make him answerable for an act of carelessness of the servant is to charge him with what he neither committed nor was able to prevent or foresee.

"Let me guard myself against misunderstanding, by saying, that I am not contending for any immunity for the master in any case where he is justly chargeable with personal neglect or blame. For instance, if he makes regulations calculated to cause mischief—if he knowingly provides materials improper for the work in hand—if he does not exercise due vigilance over his labouring men, and in many other cases, he might fairly be held liable as for his own fault. What I contend against is the law which makes him suffer where he is blameless, the fault lying entirely with the servant—as it commonly does."

After arguing out the position he supports at considerable length, Mr. Brown proposes to carry out his views as to the limitation of the master's liability in this way:—

"Let it be enacted that in no case should a master be responsible in damages for the negligence of a servant beyond the amount of £200, or any other fixed sum which may be considered a sufficient penalty for keeping a servant who committed an error. If, however, the public come to see the injustice of punishing a master at all, where he has taken due care to hire an experienced servant of good character, the requisite amendment of the law would be effected by enacting as follows:—1. That no action should be brought against the master without joining the servant who did the mischief as co-defendant. 2. That the master should be entitled to acquittal on proof that he took due care in the engagement of the servant, and was personally free from any other kind of blame. 3. That the guilty servant should be compelled to pay a part of his wages weekly towards the satisfaction of the damages, with a summary remedy to enforce payment. Imprisonment might be justly added in cases of injury to life or limb.

"I submit that such a law would be far preferable to that which now subsists. To see the way in which it operates is enough to extort from one an outcry against the perversity of mankind, and the imbecility of laws to deal with it. Because men are prone to negligence, and because society requires some protection from this propensity, the law has endeavoured to give it by allowing such actions as I have described. What can be more laudable or politic in appearance? Yet the effect has been to let in a flood of fraud and perjury, imposture and injustice—such as excites a doubt whether greater mischief would arise from abolishing such actions altogether. Too often they exhibit the spectacle of a court of law laboriously doing iniquity in the name and with the forms of justice—a scene the most revolting to every right-minded man."

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* "Institutes of Menu," by Sir W. Jones, p. 181, ss. 293, 294, last edition.

Thus far the Essayist's remarks are mainly confined to the liability of individuals who are obliged to employ servants. He then proceeds to discuss its connection with the liability of railway companies for accidents arising from the default of those who carry on the business, and he considers the question in two aspects—accidents to strangers and to passengers; and there is undoubtedly a distinction fairly to be drawn. He thus speaks of the exceptional nature of railway traffic:—

> "Railway traffic is a business which cannot be carried on without danger nor without occasional accidents; and when an accident does occur, the damage arising from it is often so enormous as to be out of all proportion to the payment made by the injured passengers to the company, and not less out of proportion to the act of delinquency which brought about the accident. A momentary oversight by a weary signalman may cause the loss of twenty lives or damages to the amount of £50,000. The public will have trains running from twenty to fifty miles an hour; they will have excursion and luggage trains; and this cannot be done without serious accidents occasionally happening. Drivers and signalmen are only mortals; they will at times be off their guard, or weary, or drowsy, or negligent. Probably they are as careful now as they are ever likely to be. The system of punishing railway companies by enormous damages for accidents arising from the errors or neglects of drivers and other servants has been in force a great many years, without putting a stop to accidonts. Whatever amount of care is exercised by railway managers in selecting good and careful servants, the latter are but men and not guardian angels without wings, at two guineas a week, as the public would have them. Is any man so green as to believe that railway traffic can ever be carried on without serious accidents? As well might we expect to navigate the ocean in future without shipwrecks. Every man who embarks in a ship for a distant voyage knows that he must risk his life in so doing, and so does every man who gets into a railway train. The two things are inseparable; the passenger voluntarily encounters the hazard, without which he can't make the journey; he becomes a partner in the risk, and must share the loss when it happens. If a man were to go up in a balloon, and were to break his leg in the descent, many people would say, 'What else could he expect?' The public can't see that this applies to a journey by railway, and yet our fathers would certainly have said the same of any man who got hurt while travelling forty miles an hour. Is it fair, therefore, to put all the loss on the railway company when an accident happens, seeing that railway travelling cannot be carried on without accidents? The law recognises this in other cases. Where a servant voluntarily takes employment under a master who carries on a dangerous trade, such as the making of gunpowder or the blasting of slate quarries, the law does not allow him any remedy against his master for accidents arising from the nature of the business, even though caused by the neglect of the other men employed in it. The reason is that, by entering into the business he voluntarily ran the risk incidental to it."*

The learned author then enlarges upon the following points: that the damages arising from railway accidents are out of all proportion to the payment received from the passenger and to the error committed by the company's servant: that no infliction of damages can compel or enable directors to do more than employ good servants, it cannot prevent or guard against the errors to which the best servants are liable; and that the enormous amounts given by way of compensation in England greatly encourage attempts at fraud and imposture on companies.

This very able pamphlet concludes by a suggestion that,—

> "Some special tribunal ought to be established for the cognizance of all railway accidents—such, for example, as exists in the Admiralty Court, where the judge is assisted by experienced nautical men as assessors. A court composed of one of the judges, with two experienced medical men as assessors, having powers to make private examinations of the claimant, would surely be much better able to detect fraud and imposture and to probe suspicious claims to the bottom than a jury. The experience which they would acquire in dealing with fictitious or fraudulent claims would often prevent the court from being made the tool of rogues. Such a court might exercise with discretion, and ought to be armed with inquisitorial powers. Whatever odious terms may be applied to such a tribunal by popular outcry, every lawyer who has been in the secrets of these cases, knows by experience that all the existing powers of courts of law are wholly inadequate to ferret out, expose and punish the infamous cheats which are daily practised by fraudulent claimants. When one sees, as in a recent case, a man claiming £2,000,

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* Judgment in *Hutchinson* v. *York Railway Company*, 5 Exch. 343.

and recovering a verdict for £5, one is led to wish that the courts would return to the old practice of amercing '*pro falso clamore suo.*' I have reason to believe, and I say it with disgust, that I have more than once been made the unwitting instrument of cheating railway companies; and no counsel who has been concerned in these cases is free from the same unpleasant suspicion.

"One and the same tribunal ought also to hear and determine all claims arising out of the same accident. This alone would do something to moderate the excessive damages often given by juries, each of whom only hear one case, and are not allowed to take notice of the numerous other large claims behind. It would also diminish the expense arising from so many different actions.

"I venture another suggestion. In very many claims for personal injuries by accidents, the amount of damages chiefly depends on whether the injury will be permanent, or whether nature will not remedy it in a few months. On this point it constantly turns whether the damages should be £500 or £2,000. At present the jury have to decide it on conflicting medical opinions, before sufficient time has elapsed to test the permanence of the injury. The verdict is probably for the larger sum, and very soon after the plaintiff will be seen about and as well as if he had never been hurt. It is astonishing what miraculous cures are wrought by a verdict for large damages! I suggest that in all such cases the court ought to have power to adjourn the inquiry for a time in order to test the supposed permanence of the injury upon such terms as might be just. This might sometimes prevent a company from being compelled to pay five times the real amount of damage."

## THE SUPREME COURT OF CANADA.

We give below *in extenso* the amended Bill on this subject as introduced during the last session of the Dominion Parliament.

This Bill, though altered from that first brought before the House, cannot yet be said to be complete, and we understand that some changes will be made in it before it is again brought forward. Our readers will, however, be glad in the meantime to be in a position to make themselves familiar with the Bill as it stands, and if the careful consideration of this most important and difficult subject results in any useful suggestions, so much the better:

### *An Act to establish a Supreme Court for Canada.*

Note.—The clauses and words in brackets [ ] are to originate in Committee of the Whole.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. There is hereby constituted and established, a Court of Common Law and Equity, in and for the Dominion of Canada, which shall be called "The Supreme Court of Canada."

2. The said Court shall be a Court of Record.

THE JUDGES.

3. The Court shall consist of a Chief Justice and six Puisne Judges, any five of whom, in the absence of the others of them, may lawfully hold the Court in Term.

4. Her Majesty may appoint, by Letters Patent under the Great Seal of Canada, one person, who is or has been, a Judge of one of the Superior Courts in either of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick, or who is a Barrister or Advocate of at least fifteen years' standing at the Bar of any of the said Provinces, to be Chief Justice of the Court, and six persons who are or have been Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years' standing at the Bar of any of the said Provinces, to be Puisne Judges of the Court; and vacancies in any of the said offices shall, from time to time, be filled in like manner.

5. The Chief Justice of the Court shall have rank and precedence over all other Judges in the Dominion, or in any of the Provinces thereof; and the Puisne Judges of the Court shall also take precedence over all other Judges in the Dominion, or in any of the Provinces, except the Chief Justices in the several Provinces and the Chancellor of Upper Canada, and as between themselves according to seniority of appointment.

6. The Judges to be appointed under this Act shall reside at the City of Ottawa or within . . . . miles thereof, and shall hold their offices during good behaviour; but the Governor General may remove any Judge upon the address of the Senate and House of Commons.

7. [The salary of the Chief Justice of the said Court shall be ——— dollars per annum, and that of each of the Puisne Judges ——— dollars per annum, and so *pro ratâ* for any less period than a year during which they shall respectively hold the office, and shall be payable out of the Consolidated Revenue Fund of Canada, next after any sums already charged thereon.]

8. [Whenever any Judge of the said Court has held such office for fifteen years or upwards, or has held such office and the office of Judge of one or more of the Superior Courts

of Law or Equity, or of the Court of Vice Admiralty, in any Province in Canada, for periods amounting together to fifteen years or upwards, or becomes afflicted with some permanent infirmity disabling him from the due execution of his office, then if such Judge resigns his office, Her Majesty may by Letters Patent under the Great Seal of Canada, reciting such fact, grant him an annuity equal to two-thirds of the salary attached to the office he held at the time of his resignation, and to commence from the date thereof, and to be paid out of the Consolidated Revenue Fund of Canada, and payable *pro ratâ* for any less period than a year.]

9. Every Judge to be appointed in pursuance of this Act, shall, previously to his executing the duties of his office, take the following Oath:

"I, ————, do solemnly and sincerely promise, and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me, as Chief Justice (*or* as one of the Judges) of the Supreme Court of Canada."

10. The Oath shall be administered to the Chief Justice by the Governor in Council, and to the Puisne Judges in open Court by the Chief Justice.

11. No Judge to be appointed under this Act shall hold any other Office either under the Government of Canada, or under the Government of any Province of Canada.

### APPELLATE JURISDICTION.

12. The Supreme Court shall have, hold, and exercise, an appellate civil and criminal jurisdiction within and throughout Canada.

13. Unless it is otherwise provided, or the context manifestly requires another construction, the following words and expressions, when used in this Act, shall have the meaning hereby assigned to them respectively:—The word, "Judgment," when used with reference to the Court appealed from, includes any judgment, rule, order, decree, decretal order, or sentence; and when used with reference to the Supreme Court it includes any judgment or order of that Court: The word "Appeal" includes any appeal or proceeding in error to set aside or alter any judgment of the Court appealed from on a point of law, as well as an Appeal founded on the facts, or on the facts and law of any case: The expression "the Court appealed from," means the Court from which the appeal has been brought directly to the Supreme Court, whether such Court be a Court of original jurisdiction, or a Court of Error and Appeal.

14. Subject to the limitations hereinafter made,—an Appeal shall lie to the Supreme Court from all final judgments of the Court of Error and Appeal in the Province of Ontario, of the Court of Queen's Bench in the Province of Quebec, of the Supreme Court in either of the Provinces of Nova Scotia and New Brunswick, and of any other Superior Court of last resort, now or hereafter established in any Province of Canada,—and from any preliminary or interlocutory judgment which would carry execution by ordering something to be done which could not be remedied by the final Judgment, or whereby the matter in contestation may be in part decided, or whereby the final hearing and judgment would be unnecessarily delayed.

15. An appeal shall also lie directly to the Supreme Court from all judgments in civil matters of any of the courts of superior jurisdiction in any of the Provinces, by consent of parties.

16. Five Judges of the Supreme Court shall constitute a quorum for the purpose of hearing and determining cases in Appeal: Provided that no judgment of the Court appealed from shall be affirmed or reversed without the concurrence of at least four Judges of the Supreme Court; except that where the number of Judges concurring is less than four, and either party desires to appeal to Her Majesty in Council, the judgment of the majority of the judges present at its delivery may, by consent of parties, be considered the judgment of the Court for the purpose of allowing such appeal, but for no other purpose whatever.

17. The Supreme Court, for the purpose of hearing and determining appeals and of exercising such original jurisdiction as is hereinafter directed to be exercised by the Court sitting in Term, shall hold two terms in each year, at the City of Ottawa, one of such terms beginning on the third Monday in January, and the other beginning on the third Monday in June, in each year, and each of such terms shall continue for the space of twenty days, subject to the provision in the next following section.

18. The Supreme Court may continue the said terms beyond the said twenty days, or adjourn the same from time to time, and meet again at the time appointed, for the transaction of business; and any sittings held in pursuance of such continuance or adjournment shall be deemed part of the term, and the Court may then do whatever it could do during the said twenty days.

19. The Supreme Court shall have power to quash proceedings in cases brought before it, in which an appeal does not lie, or where such proceedings are taken against good faith, or in which proceedings in Error may be quashed according to the law and practice of the Court of Exchequer Chamber in England.

20. The Supreme Court shall have power to dismiss an appeal, or to give the judgment, and to award the process or other proceedings, which the Court whose judgment is appealed from ought to have given or awarded; and the Court, in its discretion, may make any order with respect to the payment of costs in in the Court appealed from, or in the Court below it (if any) in which the cause originated,

and also of the appeal, and as well when the judgment appealed from is reversed, as when it is affirmed.

21. Proceedings in the Supreme Court in Appeal shall, when not otherwise provided for by this Act, or by the general rules and orders to be made in pursuance hereof, be as nearly as possible in conformity with the present practice of the Judicial Committee of Her Majesty's Privy Council in England.

22. An appellant may discontinue his proceedings by giving to the respondent, and filing in the office of the Registrar, a notice entitled in the Court and cause and signed by the appellant, his attorney or solicitor, stating that he discontinues such proceedings, and thereupon any Judge of the Court in chambers may direct judgment to be entered, as of course, dismissing the appeal, with costs, and and the respondent shall be at once entitled to the costs of, and occasioned by, the proceedings in appeal.

23. A respondent may consent to the reversal of the judgment appealed from, by giving to the appellant a notice entitled in the Court and cause, and signed by the respondent, his attorney or solicitor, stating that he consents to the reversal of the judgment, and thereupon the Court shall pronounce judgment of reversal, as of course.

24. The judgment of the Supreme Court in Appeal, shall be certified by the Registrar, to the proper officer of the Court appealed from, and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the Court last mentioned.

25. In case an appellant unduly delays to prosecute his appeal, or fails to bring on the appeal to be heard at the first term of the Supreme Court, after the appeal is ripe for hearing, the respondent may, on notice to the appellant move the Court, or a Judge thereof in Chambers, for the dismissal of the appeal, and such order shall thereupon be made as to the Court or Judge seems just.

26. An appeal shall lie to the Supreme Court from a judgment upon a special case, unless the parties agree to the contrary; and the proceeding for bringing a special case before the Court shall, as nearly as possible, be the same as in the case of a special verdict, and the Court shall draw any inferences of fact from the facts stated in the special case which the Court appealed from ought to have drawn.

27. No appeal shall be allowed in any case, unless notice thereof be given in writing to the opposite party, or his attorney or solicitor, within twenty days after the judgment complained of, or within such further time as the Court appealed from, or a Judge thereof may allow.

28. No appeal shall be allowed, unless within twenty days after such notice shall have been given, or within such further time as the Court appealed from, or a Judge thereof may allow, the appellant files with the proper officer of the said Court, a memorandum or statement in writing of theg rounds of appeal.

29. Provided always, that the Supreme Court, or any Judge thereof, may allow an appeal under special circumstances, notwithstanding that the notice of appeal may not have been given, or the memorandum or statement of the grounds of appeal filed, within the time or in the manner hereinbefore provided; but in such case, the Court or Judge shall impose such terms as to security or otherwise, as may seem proper.

30. No appeal shall be allowed until the appellant has given proper security to the extent of five hundred dollars to the satisfaction of the Court from whose judgment he is about to appeal, or a Judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded, in case the judgment appealed from be affirmed.

31. Upon the perfecting of such security, execution shall be stayed in the original cause, except in the following cases:—

1. If the judgment appealed from directs an assignment, or delivery of documents, or personal property, the execution of the judgment shall not be stayed until the things directed to be assigned or delivered have been brought into the Court appealed from, or placed in the custody of such officer or receiver as the said Court may appoint, nor until security has been given to the satisfaction of the said Court, or of a Judge thereof, in such sum as the said Court or Judge may direct, that the Appellant will obey the judgment of the Supreme Court:—

2. If the judgment appealed from directs the execution of a conveyance or any other instrument, the execution of the judgment shall not be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the judgment of the Supreme Court.

3. Provided that, if the Court appealed from be itself a Court of Appeal, and such assignment or conveyance, document, instrument, or property, or thing, has been deposited in the custody of the proper officer of the Court in which the cause originated, the appellant's consent that it shall so remain to abide the judgment of the Supreme Court, or of any appeal from it to the Queen in Council, shall be binding on him, and be deemed a compliance with the foregoing requirements of this section.

4. If the judgment appealed from directs the sale or delivery of possession of real or immoveable property or chattels real or immoveable, the execution of the judgment shall not be stayed until security has been entered into, to the satisfaction of the Court appealed from, or a Judge thereof, and in such sum as last mentioned Court or Judge may direct, that during the possession of the property by the appellant, he will not commit, or suffer to be committed, any waste on the property, and that if the judgment appealed from be affirmed,

he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; and also, in case the judgment is for the sale of property, and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency.

5. If the judgment appealed from directs the payment of money, either as a debt, or for damages or costs, execution thereon shall not be stayed until the appellant has given security to the satisfaction of the Court appealed from, or of a Judge thereof, that if the judgment, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed, if it be affirmed only as to part, and all damages awarded against the appellant on appeal.

32. If the judgment appealed from directs the delivery of perishable property, the Court appealed from, or a Judge thereof, may order the property to be sold, and the proceeds to be paid into Court, to abide the judgment in appeal.

33. When, on an appeal against any judgment, the Supreme Court affirms such judgment, interest shall be allowed for such time as execution has been delayed by the appeal.

34. When the security has been perfected and allowed, any Judge of the Court appealed from, may issue his fiat to the Sheriff to whom any execution on the judgment has issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not.

35. If at the time of the receipt by the Sheriff of the fiat, or of a copy thereof, the money has been made or received by him, but not paid over to the party who issued the execution, the party appealing may demand back from the Sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the Sheriff, upon such demand, the appellant may recover the same from him in an action for money had and received, or by means of an order or rule of the Court appealed from.

36. In the case of the death of one of several appellants pending the appeal to the Supreme Court, a suggestion may be filed of his death, and the proceedings may thereupon be continued at the suit of, and against the surviving appellant, as if he were the sole appellant, and such suggestion, if untrue, may be set aside on motion made to the Supreme Court, or a Judge thereof in chambers.

37. In case of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant, may, by leave of the Supreme Court, or a Judge thereof, file a suggestion of the death, and that he is such legal representative, and the proceedings may thereupon be continued at the suit of, and against such legal representative, as the appellant; and if no such suggestion be made, the respondent may proceed to an affirmance of the judgment, according to the practice of the Court, or take such other proceedings as he may be entitled to, and such suggestion, if untrue, may be set aside on motion by the Court, or a Judge thereof.

38. In the case of the death of one of several respondents, a suggestion may be filed of such death, and the proceedings may be continued against the surviving respondent, and such suggestion, if untrue, may be set aside on motion by the Supreme Court, or a Judge thereof.

39. In the case of the death of a sole respondent, or of all the respondents, the appellant may proceed, upon giving one month's notice of the appeal, and of his intention to continue the same, to the representative of the deceased party, or if no such notice can be given, then upon such notice to the parties interested, as a Judge of the Supreme Court may direct.

### APPEAL TO THE QUEEN IN COUNCIL.

40. If any final judgment of the Supreme Court be given for, or in respect of any sum or matter at issue of or above the amount or value of *five hundred pounds sterling*, or if such judgment involves directly or indirectly, any claim, demand, or question to, or respecting property or any civil right, amounting to, or above the value of five hundred pounds sterling, any party feeling aggrieved by such judgment, may within *fourteen* days next after it is given, apply to the Supreme Court by motion or petition, for leave to appeal therefrom to Her Majesty in Her Privy Council.

41. Such appeal shall not be allowed, until the appellant has given security to the Supreme Court, or a Judge thereof, in a sum not exceeding *five hundred pounds sterling*, for the prosecution of the appeal and the payment of all such costs as may be awarded by Her Majesty, or by the Judicial Committee of Her Majesty's Privy Council, to the respondent: and the Supreme Court may either direct that its judgment so appealed from shall be carried into effect, or that upon the perfecting of such security as aforesaid, the execution of such judgment shall be suspended, subject to like conditions as are provided in section *thirty-one* with respect to appeals to the Supreme, or such of them as is or are applicable to the case, and security being given, as thereby required, to the satisfaction of the Supreme Court or a Judge thereof, that the appellant will obey the judgment of Her Majesty in Her Privy Council; and if such security be perfected within *three months* from the date of the motion or petition in appeal, then, but not otherwise, the Supreme Court shall allow the appeal.

42. The Supreme Court may, also, on the petition of any party feeling aggrieved by any preliminary or interlocutory judgment of the Court in any such case as is mentioned in

section *forty*, under which anything would be done which could not remedied by the final judgment, or whereby the matter in contestation would be in part decided, or the final hearing and judgment unnecessarily delayed, grant permission to such party to appeal against the same to Her Majesty in Her Privy Council, subject to the same conditions, provisions, and limitations as are hereinbefore made respecting appeals from final judgments.

43. Nothing in this Act shall extend or be construed to extend to take away or abridge the undoubted right of Her Majesty, upon the humble petition at any time of any party feeling aggrieved by any judgment of the Supreme Court, in any case in which it may appear to Her Majesty that some constitutional question, or some matter of great public interest, or some right, the value of which cannot be estimated in money, is involved, or in which for any other reason Her Majesty may be so advised, to admit the appeal of ssch party therefrom, upon such terms, securities, limitations, restrictions, and regulations as Her Majesty may think fit, or to reverse, correct, or vary such judgment as to Her Majesty may seem meet; but except in cases where an appeal is allowed by this section, or the three sections next preceding it, the judgment of the Supreme Court shall be final and conclusive.

### CRIMINAL APPEALS.

44. A person convicted of treason, felony, or misdemeanour, before any Court of Oyer and Terminer or Gaol Delivery, or in the Court of Queen's Bench in the Province of Quebec on its Crown side, whose conviction has been affirmed by any Superior Court, or in the Province of Quebec by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmation, and the said Court shall make such rule or order therein, either in affirmance of the conviction, or for granting a new trial, or otherwise, as the justice of the case requires, and for such rule or order into effect, anything in the eightieth section of the Act, 32 and 33 Victoria, chapter twenty-nine, to the contrary notwithstanding: Provided that no such Appeal shall be allowed where the Court affirming the conviction is unanimous, nor unless notice of Appeal in writing has been served on the Attorney General, within *twenty* days after such affirmance.

45. Unless the Appeal is brought on for hearing by the appellant at the first term of the Supreme Court, after such affirmance, the Appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court.

46. The judgment of the Supreme Court, in such cases, shall be final and conclusive.

### SPECIAL CASE ON CONSTITUTIONAL MATTERS.

47. The Governor in Council, may direct a special case to be laid before the Supreme Court sitting in term, in which special case there may be set forth any Act passed by the Legislature of any Province of the Dominion of Canada, and thereupon there may be stated, for the opinion of the said Supreme Court, such questions as to the constitutionality of the said Act, or of any provision or provisions thereof, as the Governor in Council may order.

48. The Supreme Court shall, after hearing counsel for the Dominion of Canada, and for the Province whose Act may be in question (if the respective Governments of the Dominion and the Province think fit to appear,) and also after hearing counsel for any person or persons whose interests may be affected by the said Act, and who may desire to be heard touching the questions submitted for the opinion of the Court, and who shall have obtained leave to appear and be so heard on application to a Judge of the said Court in chambers, certify their opinions upon the said special case to the Governor in Council.

### ORIGINAL JURISDICTION.

50. The Supreme Court shall have original jurisdiction in Canada, in all cases in which it shall be sought to enforce any law of Canada relating to the revenue, including actions, suits and proceedings, by way of information, to enforce penalties, and proceedings by way of information *in rem;* or in which demand shall be made or relief sought in respect of any matter which might in England be the subject of a suit or action in the Court of Exchequer on its Revenue side, by or against the Crown or the officers of the Crown.

51. The Supreme Court and any judge thereof shall have original concurrent jurisdiction to issue the Writ of Habeas Corpus *ad subjiciendum*, to bring up the body of any person in custody within Canada, in pursuance of any treaty with any foreign State or Government for the extradition of criminals, or in pursuance of any Act of the United Kingdom, or of the Parliament of Canada, to carry out the provisions of any such treaty, and on the return of such writ to make such order as to the remand or discharge of the prisoner, as may seem meet.

52. At the term of the Court there shall be had in cases within its original jurisdiction;

1. Such proceedings in suits at common law as may be had before Courts of common law sitting in banc;
2. The re-hearing of causes, petitions, and motions in equity causes which may have already been heard before a single Judge.

53. In any proceedings within the original jurisdiction of the Supreme Court, one of the Judges of the said Court may sit either at the City of Ottawa, or at any other place or places appointed by the Court, and at such time or times as may be prescribed by the Court, to try issues in fact, and hear causes in equity, in actions or suits originally brought or instituted in the Supreme Court.

54. A single Judge of the Supreme Court

may in cases within its original jurisdiction, sit in Court out of Term, and may hear and determine motions, petitions, and all other interlocutory applications in equity suits, and dispose of matters of practice not cognizable by a Judge sitting in chambers, in actions at common law.

55. The procedure in suits and actions within the original jurisdiction of the Court, shall, unless otherwise herein provided or until otherwise provided by general rules made in pursuance of this Act, be regulated by the present practice and procedure of Her Majesty's Court of Exchequer at Westminster.

56. Issues of fact, on the common law side of the Court. shall be tried according to the laws of the Province in which the cause of action arose.

57. The process of the Supreme Court shall run throughout the Dominion, shall be tested in the name of the Chief Justice and shall be directed to the Sheriff of the County, or other judicial division into which any of the said Provinces may be divided, in which such process is to be executed; and the Sheriffs of the said respective Counties or divisions shall be deemed and taken to be, ex-officio officers of the Court, and shall perform the duties and functions of Sheriffs in connection with the Court; and in any case where the Sheriff may be disqualified, process shall be directed to any Coroner of the County, or other judicial division.

58. [The Sheriffs and Coroners shall receive and take to their own use, such fees as the Judges of the Supreme Court shall, by general order, fix, and determine.]

59. For the trial of any issues of fact by a jury, a judge of the Supreme Court may order a writ of *venire facias* to be issued, directed to the Sheriff or Coroner, as the case may be, commanding him to summon a panel of thirty-six jurors according to the jury laws of the Province where the issues are to be tried, to attend at the time and place in such writ named, and the Sheriff or Coroner shall execute and return the said writ as directed thereby.

### GENERAL PROVISIONS.

60. There shall be a Registrar of the Supreme Court, who shall reside and keep his office at the City of Ottawa.

65. [The Registrar shall be appointed by an instrument under the Great Seal of Canada and shall hold office during pleasure, and shall be paid a salary at the rate of dollars per annum.]

62. [All fees payable to the Registrar under the provisions of this Act shall be paid by means of stamps, which shall be issued for that purpose by the Minister of Inland Revenue, who shall regulate the sale thereof, and the proceeds of the sale of such stamps shall be paid to the Receiver General, and form part of the Consolidated Revenue Fund of Canada.]

63. The Judges of the Court may appoint such persons as they may think fit, being barristers-at-law or advocates, of not less than three years' standing, to be masters, referees, and examiners in suits in equity depending in the Court, to whom reference may be ordered, and who may take evidence in causes in equity depending therein.

64. [The said masters, referees, and examiners shall receive and take to their own use such fees as the Court may, by general orders direct.]

65. A fit and proper person, being a Barrister or Advocate of at least five years' standing, may be appointed by the Governor, to hold office during pleasure, as the Reporter of the Court, who shall, subject to the direction of the Judges of the Court, report the decisions thereof, and publish such reports [and such reporter shall be paid a salary at the rate of dollars per annum, out of the Consolidated Revenue Fund of Canada ]

66. All persons authorized to take affidavits in any of the Superior Courts of any Province in Canada, may take affidavits in such Province, to be used in the Supreme Court.

67. All persons being barristers or advocates in any of the said provinces, shall be admitted by the Supreme Court sitting in term, to practice as barristers and counsel at the bar of the Court, and before the Judges thereof, upon [paying such fees as the Court shall, by its general rules or orders, fix and determine], and, upon signing a roll, to be kept in the custody of the Registrar of the Court, amongst the records thereof, to be called "The Barristers' Roll."

68. All persons being attorneys, solicitors, or proctors, in the Superior Courts of any of the said Provinces, shall be admitted to practice as attorneys, solicitors, and proctors in the Supreme Court, upon taking such oath, [and paying such fees], as shall, by the Court, be prescribed and fixed, and upon signing a roll, to be kept in the custody of the Registrar of the Court amongst the records thereof, to be called "The Roll of Attorneys and Solicitors."

69. The Judges of the Supreme Court, or any five or more of them, of whom the Chief Justice shall be one, may from time to time, make general rules and orders for regulating, as well the original as the appellate procedure of the Court, and for the effectual execution of this Act, and of the intention and object thereof, and for fixing the fees and costs to be taxed, and allowed to, and received and taken by, the practitioners and officers of the Court, and may, from time to time, alter, and amend any of such rules or orders, and make other rules or orders instead thereof.

70. The foregoing enactments of this Act shall come into force respectively, upon a day or days to be named by the Governor, in a Proclamation or Proclamations to be issued for that purpose; provided that the same day or different days may be named in any such Proclamation for the coming into force of these

of the said enactments which relate to the original jurisdiction of the Supreme Court, and of those which relate to its appellate jurisdiction and other matters: And the provisions respecting appeals to the Supreme Court, shall apply to judgments rendered before the days so appointed for the coming into force of the enactments relative to the appellate jurisdiction of the Court, provided the twenty days after the judgment, limited by section *twenty seven*, for giving notice of appeal have not elapsed, and that such notice is given within the said twenty days:—or, provided an appeal to the Queen in Council has been allowed, and that before the record in the cause has been transmitted to the Registrar of Her Majesty's Privy Council, and while it would be still competent to the appellant so to transmit the same, as having complied with all the preliminary requirements of the law within the periods limited for each, the appellant gives to the respondent, and files in the Court appealed from, a notice that he intends to appeal to the Supreme Court, and complies afterwards with all the requirements of this Act, reckoning such notice as the notice of appeal to the Supreme Court, mentioned in section *twenty seven*: and the security (if any) given by the appellant with reference to the appeal to the Queen in Council, shall in such case become void.

71. This Act may be cited as "The Supreme Court Act."

## SELECTIONS.

## THE MARRIAGE LAWS

### OF VARIOUS COUNTRIES, AS AFFECTING THE PROPERTY OF MARRIED WOMEN.*

By the Hon. Wm. Beach Lawrence.

Marriage, according to Grotius and Blackstone, was always a matter *juris gentium*, and with the intercourse now existing between the different portions of the civilized world, and especially between the people of a common descent on the two sides of the Atlantic, every incident connected with it is of general interest. And no citizen of any country marrying abroad or coming to reside abroad after marriage can well know to what extent the laws of other countries on this subject may not be applicable to him.

Important, however, as the protection of the rights of property of married women is, the questions which concern her matrimonial status are of paramount consideration. Marriage, though a contract, is a contract *sui generis*, and among its peculiarities is that it is impossible by rescinding it, after it has been once consummated, to restore one of the parties to the condition which existed before the contract was entered into. The Common Law of Europe, and which is still the law of Scotland, by regarding every promise of marriage between persons of the age of puberty, followed by consummation, as constituting an irrevocable contract, protected the feebler sex against the stronger, and was the ægis of woman's honor.

The decision rendered by your House of Lords in 1843, declaring a person ordained by a bishop to have been essential by the Common Law of England to the validity of a marriage, it is unnecessary to say created the most profound amazement in the United States. As our law of marriage has no other basis than the law of England as it existed before the time of Lord Hardwicke's Act, if the interposition of a clergyman ordained by a bishop was necessary with you it could not, in the absence of any statutory regulations, have been less obligatory with us.

It is unnecessary to inquire as to the soundness of the decision in the *Queen* v. *Millis*, rendered by a divided vote of the House of Lords, and against which the eminent judge of the Ecclesiastical Court, Dr. Lushington, on the earliest occasion, so earnestly protested. Neither the solemnization by a priest, as contended for by the English Common Law judges, nor the decree of the Council of Trent requiring the presence of the curate and two witnesses to the verification of a marriage between Catholics, impose any additional restrictions on the parties in the contracting of marriage. On the contrary, the Council of Trent, whose professed object it was to establish a system which would prevent for the future scandals arising from the repudiation, by persons belonging to the Church, of clandestine marriages of which the proofs were wanting, refused to declare invalid marriages contracted without the ecclesiastical benediction. At the same time they anathematized all who should say that the marriage of children without the consent of their parents was null.

Constituted as human nature is, every restriction on marriage must operate to induce illicit connections, and such connections, as a general rule, must be based on a sacrifice of the middle and lower classes to the licentiousness of the higher. As it was well expressed by Sir James Mackintosh, the whole legislation of Europe on the subject of marriage has been a contest of patrimony against matrimony, though, viewed in this light, it is not a little extraordinary that the authors of the Code Napoleon, who had just proclaimed the equality of all citizens, should have referred as an authority for their articles on marriage to the edict of Henry II. of 1556, and to the ordinance of Louis XIII., which were professedly intended to prevent *mésalliances*. If the object of the Code had been to make lawful marriage an exceptional institution and concubinage the normal rule, no more effective enactments could well have been devised than the restrictions which it imposes. The provisions of the Roman law as to parental authority are exaggerated, and while the criminal condemned to the '*travaux forcés*' is deprived of all other civil rights, he retains an absolute veto over the marriage of his children to an age beyond that of legal majority for other purposes, and is entitled to '*actes respectueux*' from them at every age, the absence of which would expose the marriage to be nullified, and which in any event create unjustifiable delay.

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* The above is an authentic report of the speech made by Mr. Lawrence, in the discussion on the Married Women's Property Bill, at the Bristol Congress of the Social Science Association in October last.—*Ed. Law Magazine.*

The rule early introduced into Germany, which prohibited marriages of members of sovereign houses even with the higher nobility, extended, till modified by the improved legislation of the new confederacy, to all intermarriages between different classes of the community. The laws of many of the German States, more just than the French Code, seem to have contemplated the natural result of a system which imposed innumerable artificial impediments to marriage, and in the Codes of Prussia and Saxony the '*Verlobniss*' forms a separate chapter. Though such connections were terminable without legal proceedings, provision is made for the legitimacy of the children born under them, and in Prussia there is a complete code respecting what the '*Allgemeines Landrecht*' terms marriages of the left hand.

In England legislation against *mésalliances* only goes back about a century. It dates from Lord Hardwicke's Act, as it was called, passed in 1753. For a long time previous, almost every year, Bills to prevent clandestine marriages, that is to say, to protect the aristocracy against the improvident marriages of their prodigal heirs, passed the House of Lords but failed in the Commons. Lord Hardwicke's Act not only prohibited any suit before an Ecclesiastical Court to compel the celebration *in facie ecclesiæ* of a marriage contracted either *per verba de præsenti* or *per verba de futuro*, but the rule as to the consent of parents, which the Canon Law had never required, was rigorously applied. Moreover an omission of the minutest forms was fatal. Unlike the French judges, who are vested with discretionary power in the case of omission of the preliminary requirements of the Code to look at the motives, whether the object was clandestinity, or the omission of the formalities was accidental, the reports of the English Courts will show cases where marriages, which had lasted twenty-five years, and in one case nearly forty, were annulled after the birth of children for omissions in the formalities prescribed for obtaining a license, though the license itself was perfectly regular and no suggestion of clandestinity existed. In several cases the judges expressed their regret in being compelled to adjudicate according to the letter of the law, nor was it till 1822 that Lord Hardwicke's Act received any modification. Many of the most stringent provisions of that law no longer exist, but under the Acts of 4 Geo. IV. c. 76 (1823), & 6 and 7 Will. IV. c. 85 (1836), which constitute the present marriage laws of England, though a marriage is not invalid because a license is issued under a wrong name, any mistake of name, however slight, renders void a marriage celebrated after the publication of banns.

It is said, in the report of the Royal Commission made last year, that in all these forms of English marriages, the marriage may be invalidated by a non-compliance with any requirements of the law. For instance, if the place where the marriage is celebrated is not properly consecrated or set apart, or if the marriage is effected in some other locality than where the banns have been called, or if any other error affecting time or place is made by the parties, that entirely invalidates the marriage, although, upon other grounds, there there may be no objections whatever to it.

I will not dilate further on what may be deemed only matter introductory to the subject to the present discussion. Accustomed to the jurisprudence of a country where no formal ceremony, civil or religious, is requisite to constitute a valid marriage, and every intendment is made in favor of legitimacy, it is difficult for me to comprehend a system of legislation which, for the mere object, moreover usually ineffectual, of preventing improvident marriages of spendthrift heirs, would sacrifice female virtue to family pride. It was, indeed, with no little astonishment that I read the following remarks, made in a debate in the House of Commons during the last session of Parliament:—'Suppose,' it was said, 'any gentleman in this House visited at a house in Scotland where a young lady happened to be staying, and that he and the young lady took a walk together, and, in the course of the walk, he took a piece of paper out of his pocket, on which they wrote down a mutual promise to marry, though the piece of paper might be simply put back again into his pocket, and though nobody might be there at the time, and if the persons afterwards lived in a certain way together, that would be a valid marriage, although nobody might know of the fact of the marriage for years afterwards.' It seems to me that, so far from this statement aiding the cause for which it was intended, it conclusively establishes the propriety of the Scotch law of marriage. I am very sure that there is no tribunal in my country that would not, under the facts as stated, pronounce the sentence of a valid marriage; nor is there a legislature in any state of America which would enact such a system of marriage laws as would enable the parties, if they desired it, to escape from the relation thus contracted, whether or not it was evidenced either by a priest or civil officer.

Having alluded to the English law of marriage, I ought not to leave this branch of my subject without referring to the recommendations of the Royal Commission. Though, for the reasons incidentally suggested, I cannot but think that the rights of the weaker sex require the return, pure and simple, to the old common law, very much I believe would be gained by providing, as is proposed, that no marriage celebrated by a minister of religion duly authorised or by a civil officer shall be declared void, for a non-observance of the conditions prescribed for the prevention of clandestine, illegal marriages; and that the preliminary conditions relative to residence, consent of parents, declarations required from the parties, shall only be directory.

Where marriage takes place in foreign countries, and especially between persons of different nationalities, important questions of international law present themselves, about which the jurisprudence of England and America is not in accordanee with that of the continent. While all agree that the law of the place of celebration must be observed, the French and other countries, where the rule of the personal status prevails, subject their citizens to their own laws, when contracting marriage abroad. Frenchmen, who have not lost their nationality, have two conditions to perform: they must make the publications in their *commune*, and obtain the consent of their parents. Neither the English nor American law pays any regard to these exterritorial requirements; and the consequence is, that cases exist where parties have been validly married in England or the United States, whose marriages are null in their own country.

The impediments thrown in the way of marriages abroad have induced the passage of Acts of Parliament, authorising marriages at embassies and consulates, the validity of which, as derogating from the sovereignty of the country where they are solemnised, is considered by the Royal Commission as doubtful. It would seem that this is a matter which requires a conventional arrangement, and so far as the United States and England are respectively concerned, it naturally falls within the scope of legislation required by the arrangements recently entered into by them, in regard to naturalisation and its incidents.

Though publicists are pretty generally agreed that it is the law of the husband's domicile or the matrimonical domicile, and not the law of the place of the celebration of the marriage, which, in the absence of any express contract, is to govern the respective rights of the parties, at least as to personal property, there is no general accordance between them as to the effect of a change of domicile after marriage.

In Story's time, it would appear that no case had arisen in the English courts upon the point, as to what rule ought to govern in cases of matrimonial property where there is no express nuptial contract, and there had been a change of domicile. He refers to a case (*Sawer* v. *Shute*, 1 Anstr. 63) where the Court of Chancery adopted the law of the actual domicile, though to the prejudice of the equitable provision which that tribunal was in the habit of making in favor of married women domiciled in England.

The actual domicile is the law of Louisiana now confirmed by Statute, as to all property acquired after removal into the state. And Judge Redfield, the commentator of Story, Story, contends for it as the suitable rule in all cases. He admits, however, that the Court of Appeals of New York by a divided vote had decided otherwise, holding that the rights of property between married persons continue to be governed, notwithstanding a change of domicile, by the law of the place where the marriage was celebrated, and which was also at the time the place of the domicile of the husband. This is in accordance with the French rule.

There are two systems of law applicable, on the continent of Europe, to the rights of married persons, in neither of which is the individuality of the wife suppressed, as by the English Common Law, and though in many cases the husband exercises the administration during marriage, the wife's rights of property under one form or other are retained, and the law affords her protection against the improvidence of the husband.

On the continent where the question of woman's rights arises, it is necessary to decide between the dotal *régime*, which is sometimes purely Roman, and sometimes undergoes very extensive modifications, and the community of goods which is of German origin, and which also exists under various forms. Nowhere are these systems obligatory, except in the absence of express contracts, which in some countries may be made even after marriage. The right to such marriage contracts is entirely in accordance with the express terms of the law, and not, as in England and America, in apparent evasion of it.

By the Roman law, on which the modern dotal system is founded, the husband had the sole management of the dowry given by the father to a daughter on the occasion of her marriage, but as a general rule the husband's right to it ceased at the dissolution of the marriage, and it was restored to the wife or her family. Moreover the constitution of a dowry was in no wise essential to the validity of the marriage, and all the property not comprehended in the dowry was parapbernal, of which the wife remained proprietor and over which the husband possessed no rights. By the French law there is the most entire liberty of arranging the interests of the parties by contract, subject only to the condition that it shall not interfere with the general policy of France, and particularly as respects the law of succession. No provision can be made favoring primogeniture or affecting the equality of descent among children. Not only may special stipulations be made, but the parties may in general declare whether they will marry under the law of community, the law of dowry (the general features of which as they existed in the Roman law we have described), or the law of the separation of property, the Code providing the consequences to result from the adoption of any one of these systems.

Nor is it necessary to adopt one of them in its entirety, but they may be modified or blended to suit the views of the parties. In the absence, however, of any declaration the law of community, which may therefore be deemed the Common Law of France, governs. "Under this law, the husband and wife become joint owners of all the personal property which they possess at the time of the marriage, as well as of all such property as they may acquire during the marriage, by succession, or even by gift, unless the donor express the contrary. They are also joint owners of all the real property purchased during the marriage; but such real property as is acquired by succession or gift, unless the donor declares otherwise, does not fall into the community. The husband has the sole management of the property of the community, and may sell or charge it without the concurrence of the wife; he has also the management of all the property of the wife which is excluded from the community, but he cannot alienate such of her real property as is excluded, without her consent; nor can he alienate by will the property that is included, beyond the share of it to which he will be entitled on the dissolution of the community. At the death of either of the parties, an account is taken of the properties and of the liabilities of the community, and the surplus is divided equally between the survivor and the representatives of the deceased."

Under the dotal system, "the husband has, during the marriage, the management of all the property in dowry, but he cannot, either alone or conjointly with the wife, alienate or charge any of the real property, unless provision has been made for this purpose in the marriage contract. The wife may, however, under certain conditions, make provisions thereout for the children of the marriage, or of a former marriage, and the Court will also permit the property in dowry to be sold, in certain cases, such as for releasing the husband from prison, &c The wife has the management and enjoyment of such part of her property as has not been settled in dowry, but she cannot alienate nor sue, in respect to this property, without the consent of her husband; or, in the event of his refusal, without the permission of the Court."

Where the parties stipulate by their marriage contract that they will be separate in property, the wife retains the entire management and enjoyment of her property, both real and personal. Each of the parties contribute towards the expenses according to the terms of the contract; if it is silent in this respect, the wife contributes a third of her income, though the Court may, in certain cases, order a larger contribution. The wife cannot, by virtue of any stipulation, alienate her real property without the special consent of her husband, or of the Court, in case of his refusal; and any general authority for this purpose given to the wife, either by the marriage contract or subsequently is void. The community may be confined to mere gains, leaving each party his own property, or there may be universal community which will include real estate as well as personal. The mere declaration that the parties marry without community does not constitute the separation of property so called, in which last case, as we have seen, the wife has the separate control of her property in all respects, except that she cannot dispose of any real estate without her husband's consent. In a marriage declared to be without community, the wife has not the right of administering her property, or receiving the income, which goes to the husband to support the expenses of the marriage; the husband retains the administration of the property, movable and immovable, during his life, with the right of receiving all the personal property brought as her *dot*, or which accrues to her during marriage, subject to the restoration after the dissolution of the marriage or judgment of separation of goods.

In the Spanish law the community is confined to the acquests, and each party retains his or her own property, and is liable for his or her own debts. However, where there is no inventory made at the time of the marriage, and there is no other means of distinguishing what belongs to each party, the movables are considered as acquests, and subject to the rule of the community. If under the Spanish law the woman renounces the community before the celebration of the marriage, she is married under a rule equivalent to the rule of the separation of property and not of the French *régime* without community. The Spanish jurisprudence admits of a system similar to the French *régime* without community, *i.e.* a *régime* in which the wife has neither the advantages of community, nor those of the separation of property. But for this purpose it is requisite that such a *régime* be expressly stipulated in the marriage contract. The following are its consequences upon property. The wife has no share in the acquests, neither has she the administration of her separate property, whilst in the absence of such stipulation she would retain that administration, as in the French system of separation of property.

The wife's dowry may be given her either by her parents or by third parties, and either before or during coverture. Parents are bound to furnish a dowry equal to the "*legitime*" (the portion the party would by law be entitled to in the parents' fortune in case of succession), deducting therefrom the property the bride may possess in her own right. The obligation does not exist if she marries without their consent. All the property the wife acquires during coverture as gift, legacy, or succession, is joined to the dowry. The husband is the responsible usufructuary of of the dowry. He has the administration of all personal property. but he has to give legal security for its value. Neither the husband, nor wife, nor the two acting together, can charge or mortgage the real estate forming part of the dowry, unless by authorization of a tribunal, and jointly. The husband is bound to supply the deficiency created thereby in the dowry as soon as he is able to do so.

The new Italian Code differs essentially from that of France on this subject. It has established two *régimes*, the dotal and that of the community. They are both conventional, and there does not exist any legal *régime*. In the silence of the parties, the law does not assume the adoption of either. If there is no special contract of marriage, or if the contract does not adopt either the dotal *régime* or that of the community, the property of the wife is governed by the parapbernal rule, which is identical with the French, except that the law declares that the parties shall contribute to the household charges in proportion to their respective fortunes, while in the French law the woman contributes one-third.

The Common Law of Germany, as well as the Codes of Prussia and of Saxony, fully recognises the free right of the parties to make what contracts of marriage they please, with the same restrictions as those imposed by the French Code, of not interfering with the State policy, and these nuptial contracts may be made as well during the marriage as before. The parties may, by their contract, dispose reciprocally in favor of each other of any portion of their successions, saving the reserved rights of heirs, and these dispositions are irrevocable. They may, contrary to what the French Code permits, declare their marriage to be according to any of the local laws, customs, or statutes. The dotal *régime* has prevailed in the greater part of Germany, and is that of the Austrian Code, as it is also of the Bavarian. But the principle of community is the law in a great part of what constitutes the Prussian States.

The legal community varies in the different countries where the law of the community prevails. It is universal and comprehends all the property, real and personal, in many of the States. All the laws accord to the widow, as long as she does not marry, certain rights in the property of her husband, either for her life or in full property. The wife may alienate her real estate without the special consent of her husband, unless the local law subjects her to marital authority. The dotal character of the property belonging to the wife is not presumed. The husband must prove that the dotal property is not paraphernal. If the *dot* is in danger, the wife may claim against third parties the restitution. The wife or her heirs have a general mortgage upon the property of the husband for the restoration of the dower, and they have a legal mortgage upon the property of the husband for the restoration of the paraphernal property.

In Prussia, by marriage the administration of the property of the wife is confided to the husband, except so far as it is reserved to her by the law or by matrimonial conventions. What property each party contributes towards the expenses of the establishment is under the administration of the husband, but in the property reserved to the wife is included everything that relates to her personal use, the nuptial gift (morgengabe) and whatever is embraced therein, and she has the administration, usufruct, and free disposition of her reserved fortune. The savings made by a married woman from her reserved fortune belong to her. The immovables and capital inscribed in her name, and which she has acquired from an industry separate from that of her husband, form a part of the general contribution (apport), unless she carries on a commerce exclusively with her reserved means, and there is a stipulation to the contrary. The authorisation of the husband for her to sue in a court of justice, when the matter relates to her reserved fortune, is unnecessary. The husband exercises all the rights and duties of a life owner over the property of the wife not reserved, but he cannot alienate it or charge it, nor dispose of the capital inscribed in her name, without the consent of the wife. But there are cases—as those of indispensable repairs—where the tribunals will interpose if the wife refuses. The husband has the disposal of the personal property set apart for the maintenance of the family, but he cannot dispose of the reserved personal property. The wife cannot take away from the husband the administration of her portion of the property set apart for the common support, unless she provides for his support and that of the children in a manner conformable to their condition. When the debts of the wife were made before marriage, her creditors can pursue their claims against her person and all her property, but if these debts have been concealed from the husband, and reduce the contribution for the common support, he may have recourse to her reserved fortune. Community of goods does not exist among the parties, except when established by provincial law. The parties may at all times make mutual contracts of inheritance respecting their successions, and revoke them, but the wife must in this case be assisted by counsel. The dower consists of a pension allowed to the wife by the husband for her support during her widowhood. The wife has a right to the personal property belonging to the household establishment, which includes her outfit entire, the furniture for ordinary use, provisions, &c. The half of the hereditary portion, fixed by the law, to the surviving husband or wife, is regarded in the same light as the shares of the heirs, &c., and subjected to the same rules. Before the division of the property of the husband or wife, the survivor resumes possession of his or her own property.

In Saxony, the general rule, where there is no contract, is that the husband has the usufruct and administration over the fortune which the wife possesses at the conclusion of the marriage, or acquires during marriage. He is responsible for fraud or negligence. There are provisions respecting the *dot*, which is the aggregate of what is given or promised by parents or third parties, as the portion to be applied on behalf of the wife to the common support of the family. There is an obligation on the part of the parents to furnish to the future wife a portion conformable to their fortune, and to the position of the husband. The obligation to furnish a *dot*, however, does not exist if the daughter has a sufficient fortune of her own, or if she marries without consent. With respect to what the wife acquires for services, which have no reference to the affairs of the family or to her husband's position, she has the property of it, but the husband has the administration and use. If the wife has given such acquests to the husband to be employed for the purposes of the family, or has herself employed them in that way, she cannot, after the dissolution of the marriage, reclaim them. In order to be valid against a third party, the usufructuary title of the husband need not be registered. If the property of the wife is delivered to the husband with a statement of its value, he is responsible for it, and must replace it according to the indicted value. Neither of the parties is obliged to fulfil, out of his own property, the engagements of the other. All the engagements of the wife, validly contracted before or during marriage, must be discharged out of her own fortune, though it is only in certain cases that her reserved fortune is liable for those contracted during marriage. In case, by a bad administration, the husband puts in danger the fortune contributed by the wife for the common support, she may ask that the administration be given to her; and, in case of bankruptcy, the wife may reclaim her fortune according to the inventory. The right of the husband to the administration and use of the fortune, which the wife brings to the common support of the family, expires with the dissolution of the marriage. The husband is required, immediately after the dissolution of the marriage, to restore according to the regulations regarding the usufruct, the fortune which the wife had brought to the marriage. Contracts, by which the consequences resulting from marriage are determined or changed, may be made before or during marriage. If the wife has reserved with the consent of the husband the free disposition of her fortune or of a part of it, or if a third party, who has given a fortune to the wife, has decided that the wife shall have the free disposition of it, the wife may, in the absence of any other clause, dispose, without the cooperation of the husband, of the property thus reserved, administer it, and use it in any way for her own purposes. If the husband and wife agree to admit the general community of the goods, all the fortune which they both possessed at the conclusion of the marriage, or which has been acquired since, becomes, if no other stipulation exists, common, without any other form, from the time of the conclusion of the contract; and if the contract was concluded before the marriage, from the time of the marriage. The mere acceptance of the community of property confers a right to the inscription in the registers of landed estate or of mortgages of the things and rights, the acquisition of which ordinarily requires such an inscription.

The Austrian Code of 1811 is one of the best systems of jurisprudence in Europe. It applied, till the recent legislative separation of Hungary from the Cis Leithan provinces, to the whole empire. The regulations as to the obligations of the parents to furnish a *dot* are similar to those of the Saxon Code. The dower or nuptial gift is what the husband or a third party gives to a bride as a supplement to the *dot*. She has not the enjoyment of it during marriage, and only acquires the property in case she survives her husband. No dowry in the nature of a wife's *dot* is due to the wife, but as the future wife has a right to a *dot* upon the fortune of her parents, so the parents of the future husband ought to provide him an establishment proportionate to their fortune. The *morgengabe* is the present which the future husband promises to give to his wife the morrow of the marriage. When it has been stipulated, it is presumed in case of doubt that it has been given within the three first years of the marriage. The marriage does not of itself establish a community of goods between the husband and wife. It should be stipulated by contract; the form and extent are determined by the Code. In default of express stipulation, each of the married parties preserves his rights of property and of the increase of the acquests during marriage. There is no commuuity between the parties. The husband is presumed to be the administrator of the property of the wife, if she makes no objection. The husband is in this respect considered as the responsible mandatory of the fund or capital only; but he is not required to render an account of the income received during marriage. Unless there are stipulations to the contrary, his accounts are considered to be liquidated to the day when his administration ceases. The administration of the wife's fortune may, in case of danger for the *dot*, be taken from the husband, even although it had been granted to him by express contract. The widow is entitled to a dower from the time of the death of the husband, which should be paid to her quarterly, in advance. The widow who marries again loses her dower. The validity or nullity of gifts between the husband and wife are regulated by the general rules relating to gifts (donations). The husband and wife may make dispositions in favour of heirs, or make themselves mutually heirs to one another. They may conclude an agreement respecting the succession by which they reciprocally promise and accept the gift of their fortune. To these agreements respecting succession between husband and wife the disposition relative to contracts in general are applicable. Many of the provisions of the Code apply to the dissolution of Marriage by divorce.—*Law Magazine.*

## ONTARIO REPORTS.

## CANADA REPORTS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### In the matter of the Arbitration between the Provinces of Ontario and Quebec, in the Dominion of Canada.

*The British North America Act, 1867—Resignation of one arbitrator — Unanimity of arbitrators not necessary—Arbitration on public matters—Writ of prohibition from court of one Province.*

*Held*, that as "The British North America Act, 1867," confers powers to the arbitrators appointed thereunder of a public nature, such powers may be exercised by the majority, and a joint award is therefore unnecessary.

The jurisdiction of the courts of one of the litigant Provinces to interfere to stay the proceedings on the arbitration, by writ of prohibition considered, and *held* that there is none.

[Ottawa and Montreal, February—July;
Toronto, Aug., 1870.]

The British North America Act, 1867, section 142, enacts that "The division and adjustment of the debts, credits, liabilities, properties, and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada, and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec."

Under the provisions of this enactment the following persons were appointed arbitrators: The Hon. D. L. Macpherson for the Province of Ontario, The Hon. C. D. Day for the Province of Quebec, and the Hon. J. H. Gray, a resident of the Province of New Brunswick, for the Dominion of Canada.

The arbitrators had several meetings, being attended by Hon. J. H. Cameron, Q.C., as counsel for the Province of Ontario (assisted by Hon. John Sandfield Macdonald, Q C., Attorney-General for Ontario, and Hon. E. B. Wood, Treasurer of Ontario), and by T. Ritchie, Q C., Esq., as counsel for the Province of Quebec (assisted by Hon. Geo. Irvine, Q C., Solicitor General for Quebec)

On the 28th May the arbitrators met to give a preliminary decision to form a basis for the preparation of their final award. The arbitrators disagreed however as to this basis, Mr. Macpherson and Col. Gray agreeing, and Judge Day dissenting.

This preliminary award of the majority, though not delivered for some time after the above date, was as follows:—

"The Arbitrators, under the B. N. A. Act, 1867, having carefully considered the statements made, and the propositions submitted by and on the behalf of the Provinces of Ontario and Quebec, and having heard counsel at length thereupon, do award and adjudge as follows:

1st. That the Imperial Act of Union, 3rd and 4th Victoria, chap. 35, did not create in fact or in law any partnership between Upper and Lower Canada, nor any such relations as arise from a state of co-partnership between individuals.

2nd. That the Arbitrators have no power or authority to enter upon any inquiry into the relative state of the debts and credits of the Provinces of Upper and Lower Canada respectively, at the time of their Union, in 1841, into the Province of Canada.

3rd. That the division and adjustment between Ontario and Quebec of the surplus debt beyond $62,500,000, for which under the 112th section of the "B. N. A. Act, 1867," Ontario and Quebec are conjointly liable to Canada, shall be based upon the origin of the several items of the debts incurred by the creation of the assets mentioned in the 4th Schedule to that Act, and shall be apportioned and borne separately by Ontario or Quebec, as the same may be adjudged to have originated for the local benefit of either; and where the debt has been incurred in the creation of an asset for the common benefit of both Provinces, and shall be so adjudged, such debt shall be divided and borne equally by both.

4th. That where the debt under consideration shall not come within the purview of the 4th Schedule,—whether the same shall or shall not have left an asset,—reference shall be had to its origin, under the same rule as in last preceding section laid down.

5. That the assets enumerated in the 4th schedule of the B. N. A. Act, 1867, and declared by the 113th section to be the property of Ontario and Quebec conjointly, shall be divided and adjusted, and appropriated or allowed for, upon the same basis.

6th. That the expenditure made by creation of each of the said assets shall be taken as the value thereof; and where no asset has been left, the amount paid shall be taken as the debt incurred, the arbitrators having no right to enter into or adjudicate upon the policy or advantages of expenditures or debts incurred by authority of, and passed upon by Parliament.

7th. It is therefore ordered, that in accordance with the above decision, the counsel for the said Provinces of Ontario and Quebec do proceed with their respective cases.

Judge Day dissented from this judgment in the following words:—

The undersigned arbitrator dissents from the foregoing decision of the Honourable D. L. Macpherson and the Honourable J. H. Gray, two of the arbitrators appointed under the B. N. A. Act, 1867.—

Because the said decision purports to be founded on propositions which, in the opinion of the undersigned, are erroneous in fact and in law, and inconsistent with the just rights of the Province of Quebec;

Because the relation of the Provinces of Upper and Lower Canada, created by the Union of 1841, ought to be regarded as an association in the nature of a universal partnership, and the rules for the division and adjustment of the debts and assets of Upper and Lower Canada under the authority of the said Act ought to be those which govern such associations in so far as they can be made to apply in the present case;

Because the state of indebtedness of each of the Provinces of Upper and Lower Canada at the time of the Union of 1841 ought to be taken into consideration by the Arbitrators, with a view to charge the Provinces of Ontario and Quebec respectively with the debt due by each of the Provinces of Upper and Lower Canada at that time; and the remainder of the surplus debt of the late Province of Canada ought to be equally divided between the said Provinces of Ontario and Quebec;

Because the assets specified in Schedule No. 4, and all other assets to be divided under the authority of the said Act, ought to be divided equally according to their value;

And thereupon the undersigned presents an award and judgment based upon his foregoing propositions, and upon the reasons assigned in this printed opinion—in the terms following:—

The arbitrators under the British North America Act, 1867, having seen and examined the propositions submitted on the part of the Provinces on Ontario and Quebec respectively for the division and adjustment of the debts and assets of Upper Canada and Lower Canada under the authority of the said Act, and having heard counsel for the said Provinces respectively upon each of the said propositions, after due consideration thereof, are of opinion that the propositions submitted in behalf of the Province of Ontario do not, nor does either of them, furnish any legal or sufficient rule or just basis for such division and adjustment; and they do award and adjudge that the said division and adjustment ought to be made according to the rules which govern the partition of the debts and property of associations known as universal partnerships in so far as such rule can be made to apply; and the arbitrators having also heard counsel for the Provinces of Ontario and Quebec respectively upon the objection made in behalf of the former Province to the 'jurisdiction and authority' of the arbitrators to inquire into the state of debts or credits of the Provinces of Upper and Lower Canada prior to the Union of 1841, or to deal in any way with either the debt or credit with which either Province came into the Union at that time, and duly considered the same, are of opinion that the said objection is unfounded, and that they have authority, and are bound by the provisions of the said Act, to inquire into the state of the debts and credits of the Provinces of Upper Canada and Lower Canada existing at the time of the Union of 1841, and so to deal with them as may be necessary for a just, lawful and complete division and adjustment of the debts and assets of the said Provinces. And thereupon it is ordered that the counsel for the Provinces of Ontario and Quebec do proceed, in accordance with the foregoing judgment, to submit such statements in support of their respective claims as they may deem expedient."

The above judgments were by the three arbitrators ordered to be entered in the minute book, and to be communicated to the counsel for the two Provinces respectively.

About the 16th June the arbitrators severally received from the government of Quebec a minute of Council of that Government, expressing the opinion of the law officers of the Crown of Quebec, "that it was essential to the validity of any decision by the arbitrators, that their judgment should be unanimously concurred in."

The publication of the decision was therefore postponed until the action of the arbitrators could be determined on this point at their next meeting, which was to take place at Montreal on the first Tuesday in July, though the arbitrator for Ontario demanded that the counsel of both governments should have the decision communicated to them in obedience to the order made.

On the first day of this meeting, in July, at Montreal, the fact of the receipt of this communication from the government of Quebec was announced. A demand was then made on behalf of the government of Quebec that counsel should be forthwith heard on the question of unanimity, and after denial by the counsel for Ontario of the right of the government of Quebec to make any communication to the arbitrators, which was not at the same time made to the counsel or government of Ontario, and a demand made that the decision arrived at should be first declared, the question was submitted, and the arbitrators decided by a majority that Quebec should be heard on the point of unanimity.

The question was therefore argued at length before the arbitrators by

*George Irvine*, Q. C. (Solicitor General for Quebec), and *Ritchie*, Q.C., for the Province of Quebec:—

The decision of the arbitrators, to be valid, must be the unanimous judgment of the three arbitrators, for by the 142nd section of the British North America Act three arbitrators are appointed, and no provision is contained that the award of the majority shall be binding, and the submission being to three, each must join in the award. Anterior to the Imperial Act the precise terms contained in the 142nd section had been virtually agreed upon between the Provinces: (see the 16th Resolution of the Quebec Conference, as it passed in the Parliament of the late Province of Canada); and the English law must interpret the Imperial statute so far as it can be interpreted: Watson on arbitration, 64; Caldwell on arbitration, 202; Paley on agency, 117.

The Canadian Interpretation Act, which provides that when a power is delegated to three or more persons, the decision of the majority shall be valid, does not apply to the Imperial Act, but is confined to the Canadian statutes, and no such clause is to be found in any Imperial statute.

*J. Hillyard Cameron*, Q C., and *Hon. E B. Wood* (Treasurer of Ontario), for the Province of Ontario, *contra*:—

In cases of private arbitration, unless there is a power reserved to the majority, the award must be unanimous. That is the rule of the common law, although not of the French law, which makes the arbitrators a Court where the majority may decide. It is not pretended that at common law when the submission is to three arbitrators with no reservation of power to the majority two can execute a valid award in matters of ordinary private arbitration; but such is not the law in matters of a public nature. The Interpretation Act has a powerful bearing on the interpretation of the 142nd clause (see the 129th clause of the British North America Act). The Dominion Parliament are given power to deal with the public debt and property. The whole of the questions before the arbitrators in respect to that public debt and property must be considered by the light of the statutes which were passed by the Dominion, one of which is the Interpretation Act. Not only therefore are all laws left in force, but the question of the public debt and property is to be left to arbitrators, who are to decide according to the Interpretation Act.

The clear intention of the Legislature in having three arbitrators was that the majority should govern, and this is consonant with common sense and every day experience of arbitrations between private persons, and the Legislature had the possible difficulties arising from a disagreement between the arbitrators for the different Provinces in view when they appointed three arbitrators, one of whom was unconnected with either Province, and was, in effect, as an umpire.

Putting the matter upon the strictest basis as a matter of private right, the arbitrators had a right to deal with it according to the light cast upon it by the statutes of the country; but it is not necessary to deal with it on this narrow basis, for, independently of such considerations, it is not a matter of private interest and private arbitration, but a matter of public rights and reference to public arbitration, and therefore the decision of the majority must conclude the minority. This is admittedly the execution of a public trust; and is not the exercise of a power within the ordinary meaning of the rule regarding subjects of purely private interest: *Grindley* v. *Barker*, 1 Bos. & Pul. 229; *The King* v. *Whitaker*, 9 B. & C. 648; *Cortis* v. *Kent Water Works Co.* 7 B. & C. 314; see also Co. Litt., 181 (b); Roll. Ab. 329; Caldwell on arbitration, 2nd Amer. ed. pp. 202, 203 and 204, note (1) and cases there cited; Paley on Agency, 3rd Amer. ed. pp. 177 and 178, note (g) and the cases there cited, particularly *Croker* v. *Crane*, 21 Wend. 211, 218; *Ex parte Rogers*, 7 Cowen, 526, 530, and note (a); *Woolsey* v. *Tompkins*, 28 Wend, 324; *Damon* v. *Inhabitants of Granby*, 2 Pick. 345.

Shortly after the above argument Judge Day resigned his appointment, which was accepted by the government of Quebec, and a *supersedeas* was issued under the seal of that Province, discharging him from further duties as arbitrator.

On the 21st July, the day appointed for giving judgment, it was objected on behalf of the Province of Quebec that no further action could be taken in the matter owing to the resignation of one of the arbitrators, there not being in fact the three required by the Act. The counsel for Quebec, being overruled in this, stated that they withdrew from the arbitration, and the judgment of the remaining arbitrators was then delivered by the

Hon. J. H. Gray:—At our last meeting a question was raised by the counsel for Quebec, under instructions from their government (a copy of the Order in Council having been transmitted to each of the arbitrators) which would then have been decided but for the abrupt withdrawal of Judge Day, and our subsequent immediate adjournment, namely:—"That it is essential to the validity of any decision to be given by the arbitrators that their judgment should be unanimously concurred in." It remains for me now to express the decision of the arbitrators on that question.

It is to be regretted that a position of this important character should not have been taken before it was known that there was a division of opinion between the arbitrators; and it may well be assumed that it would hardly have escaped the attention of so accomplished a jurist as Judge Day, the Arbitrator of Quebec, had he deemed it tenable, or that he would, under the circumstances of the decision, have undoubtedly brought it to the notice of his co-arbitrators. The learned Judge heard the argument, but left with us no expression of his opinion, save that the arbitration was one of a public nature. The views, therefore, now delivered are those of the remaining arbitrators, and consequently of a majority.

In matters of private reference the law is plain, that unless the terms of the submission provide that a majority may rule, all must agree in the award, or it would not be binding. The impracticability in private affairs of working out an arbitration, if unanimity was essential, led to the adoption, in almost all cases of submission, of the majority clause, or the alternative provision of an umpire. So essential to the successful conducting of an arbitration has this become that in the ordinary forms of arbitration bonds, or of rules of reference, one of these clauses is almost always found inserted. Without such clause, in private arbitration it is admitted unanimity is required.

The point now is—Does the same rule apply to public references or arbitrations?—to which class it is conceded, the present inquiry belongs—the 142nd section of the B. N. A. Act, 1867, under which the arbitration is held, containing no such clause.

Mr. Irvine, the Solicitor General for Quebec, has properly narrowed the question to this point.

Mr. Ritchie, in his argument for Quebec, cited Caldwell on Arbitration, p. 102, to prove the undoubted position as to private arbitrations. In the note to that page by the able American editor, who republished the work in the United States, we find the following remarks:—

"There is a wide distinction to be observed between the case of a power conferred for a public purpose and an authority of a private nature.—In the latter case, if the authority is conferred on several persons, it must be jointly exercised, while in the former it may be exercised by a majority."

Further on, at p. 202, he says that referees appointed under a statute must all meet and hear the parties, but the decision of the majority will be binding. The correctness of these views is sustained by the citation of many authorities.

In the case of *Green* v. *Miller*, 6 Johnson, 88, as far back as 1810, it is clearly laid down:—"When an authority is confided to several persons for a private purpose, all must join in the act; *aliter* in matters of public concern." Thompson, J., says: "A controversy between these parties was submitted to five arbitrators. The submission did not provide that a less number than the whole might make an award. All the arbitrators met and heard the proofs and allegations of the parties, but four only agreed on the award; and whether the award be a binding award is the question now before the court No case has been cited by counsel where this question has been directly decided. I am, however, satisfied that when a submission to arbitrators is a delegation of power for a mere private purpose, it is necessary that all the arbitrators should concur in the award unless it is otherwise provided by the parties. In matters of public concern a different rule seems to prevail; there the voice of the majority shall be given."

In the case of *Grindley* v. *Barker*, 1 Bos. & Pul. 236, Erle, C. J., says:—"It is now pretty well established that when a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole." The same principle was recognized by the Court of King's Bench in the case of *The King* v. *Beaton*, 8 T. R. 692; see also Paley on Agency, 3rd Am. ed. pp. 177-8, note *c*, and *Broker* v. *Crane*, 21 Wendell, 211-18.

In *Ex parte Rogers*, 7 Cowen, U. S. Rep. 526, and note *a*, pp. 530 & 535, the whole position is ably and thoroughly reviewed; and in a long note citing the English as well as the American authorities bearing upon the same point, the distinction between public and private references and the duties and powers resulting therefrom are clearly shown, and the power of the majority to decide clearly established The English cases upon the point are not so direct, but in the reasoning of those which have been cited, or can be found, the same principle clearly manifests itself. In the Courts of the United States, decisions are constantly found bearing upon circumstances similar to those in our own Dominion. The varied nature of the business of that country, the different aspects under which questions arise from their position as a congregation of States, the daily development of new conflicts of rights arising from the expanding nature of their society, raise questions which do not come up in England, but the solution of which after all, in the absence of any particular local statutory provisions, is governed by the law of England. Under these circumstances our courts are in the habit of taking those decisions as guides. These cases then determine that in matters of public arbitrations or reference, though provisions to that effect be not specifically made, the decision of a majority shall be incident to the reference. The 142nd section of the British North America Act, 1867, must come within this rule. Were it not so intended, the section would be superfluous, because any one party in a great question of public importance could prevent a decision.

To work out the reasoning of the counsel of Quebec to its legitimate conclusion would place absolute power in the hands of the third or Dominion arbitrator. I have supposed that on points in which Ontario and Quebec were agreed it was my duty at once to assent, and that under such circumstances, whether I differed or not, was of no consequence; but, as the powers of all the arbitrators must be co-equal, if unanimity is essential, I might, by simply disagreeing, prevent an award, even when both Ontario and Quebec had agreed upon it. Such a position is untenable.

Mr. Macpherson and myself are therefore of of opinion that the decision of a majority must govern.

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The arbitrators then proceeded to hear the arguments of counsel for Ontario on several of the heads stated in the printed case for that Province, and some progress having been made the arbitration was adjourned until the next day. Soon after the adjournment writs of prohibition against further proceeding in the arbitration, issued from the Superior Court of the Province of Quebec by Judge Beaudry, were served on both the arbitrators, who however met pursuant to their adjournment, and then further adjourned to meet in Toronto, in the Province of Ontario, on the 4th August, 1870. Soon after this last adjournment a writ of *quo warranto* was served on Mr. Gray, calling on him to shew cause why he should not cease to exercise jurisdiction as arbitrator for the Dominion, on the ground that he had become a resident of Ontario.

On the 4th August the arbitrators met for the purpose of considering the questions arising on the service of the writ of prohibition, and as to what further action they should take in the premises.

On the 5th August they again met, and delivered the following judgments as the result of their deliberations:

**Hon. D. L Macpherson.**—The two arbitrators now present meet under circumstances calling for the most careful circumspection and thoughtfulness.

The Province of Quebec is not represented before them. The counsel for Ontario calls upon them to proceed with the evidence and to make their award.

The retirement of the arbitrator for Quebec, sanctioned by the Government of that province, was formally communicated to the arbitrators when they met at Montreal on the 21st July last, by an official letter from the Premier and Secretary, the Honourable Mr. Chauveau, in which he further preferred the extraordinary request that the remaining arbitrators "will be pleased to stay further proceedings until such time as they receive notice as to their intentions from the government of this province,"—the Province of Quebec.

A request to stay proceedings until the government of Quebec should determine whether they would appoint another arbitrator was shortly afterwards made by the counsel for that Province, and was upon consideration refused by the arbitrators; whereupon the counsel for Quebec declared that that Province would no longer be a party to the arbitration and withdrew.

Further, each of the two arbitrators now present was, since the retirement of the arbitrator for Quebec, served, while in the city of Montreal, with a writ issued from the Superior Court of the Province of Quebec, the purport of which is to prohibit them from the further exercise of their functions until a new arbitrator should be named for that Province, or to shew cause to the contrary on the 1st of September next.

The arbitrators noticed that neither the letter of Mr. Chauveau nor the application of the counsel for Quebec named any time within which it was expected such new appointment would be made.

The retirement of the Quebec arbitrator took place, on the 9th July. Mr. Chauveau's letter is dated on the 19th, and on the 22nd the writ was obtained and served. But up to this moment the arbitrators are not informed that any new arbitrator is appointed, nor in fact that it is the intention of the government of Quebec to make a new appointment.

If the government of Quebec has power under the statute to appoint another arbitrator, and if it is their intention to do so, they have had more than reasonable time for the purpose, since their acceptance of Judge Day's resignation. It was the indefinite character of the delay asked for, which induced the arbitrators to refuse it. The writ which was issued and served almost immediately after that refusal is equally indefinite and might tend to create the impression that delay in completing the award and not to obtain a reasonable time to appoint another arbitrator was the object really desired.

It appears to me, unskilled as I am in legal technicalities, taking an equitable, common sense view of the question, to be beyond any reasonable doubt that no provincial tribunal has, or can claim any jurisdiction to examine into or decide any question referred to arbitration by the 142nd section of the British North America Act of 1867, and it may be confidently asserted that the Imperial Parliament intended the award to be absolutely final. But other and not unimportant legal questions (even if not really difficult) present themselves which, if insisted on, must be determined by some competent tribunal.

Can one of the arbitrators who has undertaken and entered upon the duties assigned by the statute, and who is under no mental or physical disability, retire from or abandon these duties before completion? This question is not one on which the other arbitrators can be expected to express an opinion.

It is, however, connected with the perhaps, more strictly legal enquiry: Does the Act of the Imperial Parliament authorize the withdrawal of an arbitrator with or without the concurrence of the party who appointed him? and does it provide for the substitution of another in his place? Again, are the arbitrators who (though respectively appointed by the governments of the Dominion and of the two Provinces) derive all their power and authority from the Imperial Statute, amenable to any government or local tribunal in matters falling strictly within the scope of their powers and duties.

The statute itself does not in terms confer any authority whatever with regard to the reference on any tribunal but the arbitrators. Can there then by implication arise a power to delay, which might be so exercised as to defeat the object of the enactment? The parties interested are the Provinces of Ontario and Quebec. Can either of them as a matter of legal or moral justice call upon one of its own courts to interrupt or control the proceedings of a jurisdiction created for the sole purpose of deciding rights and interests as between the two Provinces?

If so, the authority must belong equally to the courts of either Province, and what would be the effect of a not impossible conflict between them in their directions to the arbitrators or otherwise?

These and perhaps other questions are opened by the events above stated.

They have been seriously and dispassionately considered, and not the less that their determination may involve personal responsibility to an extent which could not be and was not anticipated when the arbitrators accepted their appointment.

I feel, however, that the first duty of the arbitrators is to make a just award; that they are not responsible for the embarrassment which the present state of things has given rise to, and which adds greatly to their responsibility while it increases, if possible, their anxiety to do right.

By simply performing what they believe to be their duty, if they do anything (while impartially exercising their best judgment) that may be looked upon as prejudicial to the interests of Quebec in the voluntary absence of counsel for that Province, the just responsibility cannot be charged upon them.

If in proceeding they act illegally, their award will not be binding and can do no injury. If it should be binding the loss of the judgment and assistance of an arbitrator for the Province of Quebec, however much the remaining arbitrators may regret it, and especially that they are deprived of the valuable aid of the arbitrator who has resigned, is not their fault. The withdrawal was his act and it has been deliberately adopted by his government, who have taken legal steps in one of their own Courts by their Attorney-General, to stop further proceedings. They have thus placed the arbitrators in the invidious position of either retracting their refusal to grant indefinite delay to the Province of Quebec, or of being placed in conflict with one of the highest tribunals of that Province.

As a public functionary in the matter, as well as in my private capacity, I desire to evince in every proper way my profound respect for the court whose process has been served on the arbitrators. But it appears to me they cannot without a virtual abdication of their functions as arbitrators accept as a justification for a departure from their previously declared opinion, the preliminary order of prohibition (which I venture to think will not be finally confirmed) of a tribunal of that Province whose arbitrator's course has unnecessarly brought about this complication. I am of opinion that the arbitrators will best discharge the trust reposed in them by proceeding with the reference, and making, without unnecessary delay, an award which shall divide and adjust the debts, credits, liabilities, assets and properties of Upper and Lower Canada.

As already pointed out, if they have under the circumstances no power to make an award, the attempt to make one will create no prejudice to either party.

If they have the power, the duty arising under the Statute from an acceptance of their appointment, imperatively requires them, not by any act of theirs to suffer the time occupied and the cost occasioned by the proceedings so far taken to be utterly wasted, or to unnecessarily postpone the rendering of a final award.

The government of the Province of Quebec and the arbitrator appointed by them have had due notice that the present meeting would be held for the purpose of proceeding with business, and that it would be competent for the arbitrators, therefore, so to proceed in accordance with well established rules.

In order, however, to remove any possibility of misapprehension or doubt, I think it better, under the peculiar circumstances, that notice should now be given to the Province of Quebec and to Judge Day, of the intention of the arbitrators to proceed in accordance with the opinions just expressed, and that the arbitrators should adjourn until Wednesday the 17th inst., giving notice to all parties to the reference, that on that day they will proceed, should the government of Quebec not think proper to be represented or to assign any new or sufficient reason for their absence.

Hon. J. H. Gray—My colleague the arbitrator for Ontario having expressed a desire to adjourn for a week or ten days in order to afford time for a notification to the government of Quebec that the arbitrators would certainly proceed in absence of arbitrator or counsel on their part, unless at the next meeting they are represented—I shall most certainly concur. I think we should exhaust every reasonable effort to induce co-operation in this matter; but in order to prevent the delay which is now granted being in any way attributed to a doubt as to the power or intention of the arbitrators to proceed, it is as well to explain with distinctness the views of the arbitrators on the authority or the power of the courts of any of the provinces to prohibit or restrain their proceedings. With the highest respect for the courts of Quebec, on any matter coming within their jurisdiction, it is plain this arbitration does not. It derives its authority from an Imperial act. The government and Province of Quebec, of which those courts form a constituent part, is simply a party to the arbitration. Another province whose courts and government are entirely independent of and beyond the jurisdiction of the courts of Quebec is the other party—while the Dominion government simply appoints the third arbitrator by the authority of the Imperial act, which constitutes the tribunal. How is it possible that a subordinate part of the two provinces—because the courts are only parts of the whole machine of government—can control the action of another province and government and the arbitrator appointed by a third government, in a matter of submission to which the province, whose courts assume the authority, only appoints one out of three co-equal arbitrators? How can the courts of Quebec restrain the Province of Ontario or the arbitrator appointed by the government of that province, or the arbitrator appointed by the Dominion government, in a matter in which the whole proceedings may be carried on outside of the province or the territoral jurisdiction to which their process can possibly run? If so, the courts of the other provinces must have equal jurisdiction; and how absurd would it then be for the courts of Ontario to come forward and punish the arbitrators for not proceeding—for not discharging the duties they had undertaken—punished by Quebec for going on—punished by Ontario for not going on! Can any construction of the language of the Imperial statute sanction such a conflict of jurisdiction? But even if the proceedings were held within the limits of the territorial jurisdiction of the courts of one of the provinces, the subject-matter itself, and the parties proceeding therein may be and are, as regards that subject-matter, entirely exempt from that jurisdiction. Apart from the common-sense view of such a question, which must strike every man, the courts of law in England have left no doubt upon the point. The highest authorities, both in chancery and common law, have decided that even where proceedings in arbitration were carried on within the locality over which the courts had jurisdiction, and in which their process had full force, yet the courts would exercise no jurisdiction to restrain an arbitrator from making his award unless there was something in the conduct of *the parties to the reference* which rendered such interference necessary. The principle being, as laid down by Kerr on injunctions, page 142, that "there is no original jurisdiction of the court in the nature of a writ of prohibition to restrain an arbitrator from proceeding to make an award." Mr. Cameron cited a great many cases in which this position is illustrated and sustained, among others *The King* v. *Burdell et al.*, 5 A. & E. p. 619; *Harcourt* v. *Ramsbottom*, 1 Jacobs & Walk., C. R. 504; *Pope* v. *Lord Duncanon*, 9 T. R 177; *The Newry & Enniskillen R. Co.*, v. *The Ulster R. Co.*, 8 D. G. McN. & G. 486. In *Pope* v. *Lord Duncanon*, where the plaintiffs had revoked the authority of their arbitrator and notified the defendant, and the arbitrator refused to act, and the other arbitrators had notwithstanding proceeded and made their award, the court refused to restrain the defendant from acting upon the award—the Vice-Chancellor saying; "As in this case there is nothing whatever to show that the power which the plaintiffs had given to the arbitrator was revoked upon any just or reasonable grounds, I am bound to conclude the revocation was a wanton and capricious exercise of authority upon their parts, and consequently the motion must be refused" The resignation of Judge Day and the revocation of his authority by the Quebec government was no act of Ontario or of the arbitrator appointed by the Dominion, and it is therefore difficult to see why the Province of Ontario should be prejudiced by that act; or why the arbitrator appointed by the government of Ontario, or the arbitrator appointed by the Dominion government, should not proceed to discharge their duty. In the case of *The King* v. *Bardell*, 5 A. & E. 619, during the argument, Judge Patterson says: "Is there any instance in which the court has interfered to prevent an arbitrator making an award after revocation? The award may be a nullity when made, but that is a different point." Platt replies "search has been made for precedents, but none have been found. Blackstone's commentaries, vol. 3, edition of 1862, page 117, says: "A prohibition is a writ issuing properly only out of the Court of Queen's Bench, being a prerogative one; but for the furtherance of justice it may also now be had in some cases out of the Court of Chancery, Common Pleas or Exchequer, directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." If old Blackstone is still law, and the Imperial Act, British North America Act, 1867, is still in force—no other court but the Arbitrators' Court can have cognizance of the arbitration.

It is greatly to be regretted that there was no counsel, as in the case of the unanimity question, to argue the other side; but, as has been remarked by my colleague, that is not our fault. If these legal questions are to be raised on every occasion, it was manifestly of the highest importance that Judge Day should have remained at his post. He did not resign—so far as we know—because he differed with his colleagues in concluding that the decisions of the arbitrators need not be unanimous. He assigned no such reason for his resignation, and on that question gave no decision, and so far as his colleagues know, expressed no opinion, although he was present at the argument, and subsequently looked into the authorities with his colleagues. His resignation, as stated at the time, was on other grounds; but whether they have his able assistance or not, the remaining arbitrators must proceed with the work, and decide on all questions as they arise according to the best of their judgment.

The meeting then adjourned till the 17th instant.

On that day the arbitrators proceeded with the reference, no person being present on the part of the Province of Quebec.

## ENGLISH REPORTS.

### Grant v. Grant.

*Will—Construction—Meaning of word "nephew"—Latent ambiguity—Parol evidence.*

Devise "to my nephew Joseph Grant."

At the testator's death he had two relatives living named Joseph Grant—viz., the plaintiff, who was a son of the testator's own brother, and the defendant, who was a son of a brother of the testator's wife.

*Held*, in an action of ejectment that parol evidence tendered by the defendant was admissible to show a latent ambiguity in the will, the word "nephew" having no definite legal signification, and that the defendant might show that the testator was in the habit of calling him his nephew; also that, the ambiguity having been thus raised, the defendant might give parol evidence to remove the ambiguity and show that the testator intended the devise to him and not to the plaintiff.

[18 W. R. 576.]

This was an action of ejectment for a house and premises at Rugby, and the defendant, who was in possession, defended for the whole.

A case was, by consent, stated for the opinion of the Court under the Common Law Procedure Act, 1852.

John Grant, the testator, at the time of making the will and codicil hereinafter mentioned, and at the time of his decease, was seized in fee of a dwelling-house and premises at Rugby (being the premises in the writ in this action mentioned), and continued to live therein up to the time of his death. The said house and premises were in the said will expressed to be devised under the words—"I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live." John Grant made his will on the 18th of February, 1868, and a codicil thereto on the 21st February, 1868.

The will and codicil were as follows:—

"This is the last will and testament of me, John Grant, of Rugby, in the county of Warwick, dealer in marine stores, as follows; I direct the payment of my just debts, funeral and testamentary expenses, I bequeath to my niece Ann Liggins, the sum of three hundred pounds free of legacy duty; and I devise to my said niece Ann Liggins, her heirs and assigns, my house in Pennington street, in Rugby aforesaid, in the occupation of — Hudson, and my house in Riley's court, and my three houses in Gas Street, Rugby; I devise to my niece Mary Pettifer, her heirs and assigns, my five houses in New Bilton; I devise to my niece Emma Bench, her heirs and assigns, my house in Rugby, in the occupation of — Preast, my house at Old Bilton, in the occupation of — Pain, and my two remaining houses in Pennington street, in the occupation of Whitwell and Resishaw; I bequeath to my nephew Joseph Grant, the sum of five hundred pounds, and all the stock and household effects in the house where I now live, and I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live; I devise to my nephew James Grant, his heirs and assigns, the house and premises in the Lawford road, in the occupation of Lessimer the miller; I devise all my real estate, if any, unto my said nephew Joseph Grant, his heirs and assigns; I bequeath all the residue of my personal estate unto my said nephew James Grant absolutely; I appoint my said nephew Joseph Grant executor of this my will. In witness &c."

"This is a codicil to the last will and testament of me John Grant, of Rugby, in the county of Warwick, dealer in marine stores, dated the 18th of February, 1868. I appoint my nephew James Grant an executor of my said will in conjunction with nephew Joseph Grant; and I devise all estates vested in me as trustee or mortgagee unto the said Joseph Grant and James Grant, their heirs and assigns, subject to the equities affecting the same. In witness whereof, &c."

The testator died on the 22nd of February, 1868. His eldest brother, William Grant, survived him, and is heir-at-law. The claimant, Joseph Grant, the plaintiff in this action, is a son of the testator's brother, William Grant, and is a lawful nephew of the testator. The said Ann Liggins, Mary Pettifer, and Emma Bench, described by the testator in his will as nieces, are the married daughters of his brother, Thomas Grant. James Grant described in the will and codicil as his nephew, is a son of the testator's brother, Thomas Grant, and brother of Ann Liggins, Mary Pettifer, and Emma Bench. No brother or sister of the testator, except the said brother William Grant, had a child named Joseph Grant. The testator at the time of making the will and codicil, and up to his death, had neither child, grandchild, or other lineal descendant.* In 1838, he married Jane Scott, widow, formerly Jane Grant, spinster, who was his first cousin, and the defendant, Joseph Grant, is the son of Joseph Grant, a brother of the testator's said wife. The last-mentioned Joseph Grant, the father of the defendant, died about twenty-two years ago, leaving a widow, and his son, the defendant, then a boy of three years old. The widow died about fifteen years ago, whereupon the testator took the defendant into his own house, and brought him up, and he lived as an inmate of the testator's house till the death of the testator, and assisted him in the management of the business of a marine store dealer. The testator's brother, William, the father of the plaintiff, has a large family, of which the plaintiff is one of the younger children; and the testator had not been on good terms with or visited his said brother, who lived about twelve miles from him, for many years before his death. He did not know how many children his said brother had, and at the time he made his will did not know of the plaintiff's name or existence.

The testator was in the habit of calling the defendant his nephew, both to the other members of the family and to persons not related to him; and the testator on several occasions expressed his intention of leaving his house and business to the defendant, and also on several occasions expressed his intention that neither his brother William, nor the family of his brother William, should have any of his property.

The will was prepared by Mr. Fuller, a solicitor at Rugby, who took his instructions from testator on his death-bed, and who did not know any of the testator's relations except the Joseph Grant who lived with him; and in giving him instructions to prepare the will the testator said that it was his intention that neither his brother William, nor any of his family, should have anything, as he had lent both him and his elder sons money which had not been repaid, and he considered they had had their share of his property in that way He also told Mr. Fuller that he wished to give his nephew Joe the house in which the testator lived, his stock-in-trade, and £500, to enable him to carry on the business, and wished him to be his executor. Mr. Fuller asked the testator if by his nephew Joe he meant the person who lived with him, and helped him in his business; and he said, "Yes. I mean him down stairs;" and that he wished to give him the house and business as he had lived so long with him and helped him so much in his business. Mr. Fuller asked the testator if the person he called Joe was his nephew, and the testator replied that he was.*

The Court was at liberty to draw inferences of fact. The facts above stated between the asterisks were stated after protest by the plaintiff that they should not have been inserted in the case, and the question of admissibility of the whole or any part of such facts was reserved for the decision of the Court.

The question for the opinion of the Court was whether Joseph Grant, the plaintiff, was entitled to the said dwelling-house and premises under the above devise.

*Chapman* (*Quain*, *Q.C.*, with him), for the plaintiff, admitted that precisely similar words in the same will—viz, "I appoint my said nephew Joseph Grant executor"—had already been construed by Lord Penzance in the Probate Court adversely to the present plaintiff (see 18 W. R. 230, L. R. 2 P. & D. 8); but contended that "nephew" in its primary sense meant brother's or sister's son, and not the son of a brother or sister of a wife or husband, and referred to the dictionaries of Bayley, Johnston, and Richardson. If in all other instances in a will, the testator uses the word in its primary sense, resort cannot be had to extrinsic evidence to show that in a particular instance he used it in a wider sense. The plaintiff here fully answers the description in the will, and the defendant does not do so in an equal degree, and there is, therefore, no ambiguity, and evidence was not admissible to show the testator meant the defendant: Wigram on Wills, proposition 2; 2 Blacks. Com. 207; *Miller* v. *Travers*, 8 Bing. 244; *Richardson* v. *Watson*, 4 B. & Ad. 799; reported also. and rather differently, in 1 Nev. & M. 569; and it seems that Wigram, V. C., preferred the latter report. Lord Penzance in his judgment relied on the case as reported in 4 B. & Ad.

*Field*, *Q. C.* (*Wills*, with him), for the defendant, contended that the word "nephew" had no strict primary meaning, citing the use of the word in the authorized translation of the Bible, and in Shakspeare, and that the case, therefore, fell, not within the 1st or 2nd, but within the 3rd proposition of Wigram, and extrinsic evidence was admissible to clear up the latent ambiguity and show who the testator really meant: Hawkins on Wills, proposition 4. [Brett, J., referred to Wigram, pp. 160, 161.]

*Chapman* in reply.—The son of a brother pays less legacy duty than the son of a wife's brother [Brett, J.—But the word "nephew" is not used in the Act.]

*Cur. adv. vult*

The judgment of the Court (Bovill, C. J., Montague Smith, J., and Brett, J.) was now delivered by

Bovill, C. J.—The question raised in this case has already been decided by Lord Penzance in the Probate Court in favor of the defendant, but there is an appeal against his judgment, and the plaintiff has required the decision of this Court in the present action of ejectment, which affects the title to the real estate. The determination of the question really depends upon the admissibility of, and the effect to be given to, the parol evidence, and this evidence is of two kinds, one class of evidence being offered for the purpose of showing that there is in the will a latent ambiguity, and the other class for the purpose of explaining and removing it. The devise of the testator was to "my nephew Joseph Grant," and the point at issue is whether these words apply to the plaintiff or to the defendant. The language of the will itself is clear, and free from ambiguity on the face of it; but, as in most cases of wills parol evidence is necessary, and, therefore, admissible to identify the party intended to be described, just in the same way as such evidence is admissible to identify and to show what was the subject-matter devised. The parol evidence to prove that the plaintiff was the son of a deceased brother of the testator, and therefore answered the description in the will was clearly admissible; and it is equally competent for the defendant to endeavour to prove that the words of the will may also apply to him; and this can only be done by parol evidence, which is, therefore, admissible for that purpose.

In each case the kind of parol evidence is not admissible for the purpose of controlling, varying, or altering the written will of the testator, but is admitted simply for the purpose of enabling the Court to understand it, and to declare the intention of the testator according to the words in which that intention is expressed. If such evidence establishes that the description in the will may apply to each of two or more persons, then a latent ambiguity is exposed; and, rather than that the devise should fail altogether for uncertainty, the law allows the ambiguity which is exposed by the parol evidence to be cleared up and removed by similar evidence, provided such parol evidence is sufficient to enable the Court to ascertain the sense in which the testator employed the particular expression upon which the ambiguity arises. If the parol evidence, after exposing the latent ambiguity, fails to solve it, the Court cannot give effect to that part of the will. Thus in *Thomas* v. *Thomas*, 6 T. R. 671, where the particular devise was, "to my grand-daughter Mary Thomas of Llrelloyd in the parish of Merthyr," evidence was given that the testator had a grand-daughter of the name of Eleanor Evans, who lived in Merthyr parish, and a great grand-daughter named Mary Thomas, who lived in the parish of Llangoin, some miles from Merthyr parish. No other evidence being given, it was held that, although an ambiguity was raised, it was not solved, and, therefore, that the court could not apply the devise; that it consequently failed, and that the subject-matter of the devise went to the heir-at-law. The plaintiff's evidence in the present case clearly brought him within the description in the will. The defendant's evidence proved that he was the son of a brother of the testator's wife, and, the testator having married his first cousin of the same name as himself, the defendant's name was the same as that of the plaintiff. Does, then, the defendant by this evidence show that the description will apply to him? It is quite true that a son of a brother or a sister is generally called and known as a nephew; and this term, therefore, would no doubt apply to the plaintiff. But the word "nephew" has no definite legal signification, and there is not anything to limit the application to the precise relationship above described; on the contrary, there are many authorities to show that it has been and may be used in a much wider sense, extending to persons in a different degree of relationship; and, in its ordinary and popular sense, it is frequently and commonly applied to other persons; for instance, it is commonly applied by a husband to the son of his wife's brother or sister, or by a wife to the son of her husband's brother or sister. The son of either of such brothers or sisters would commonly call the husband and wife his uncle and aunt; nor could it be said that, in popular and ordinary language, such a description would be unusual or inappropriate. It is the court which has to be satisfied that the description may apply to the defendant; and, if it rested on this evidence alone, we should be of opinion that the defendant had brought himself within the description of the will so as to create a latent ambiguity, and to let in further parol evidence as to which of the two parties was intended to be described. It is not necessary that the description in the will should be in all respects accurate or perfect, but it is enough if it satisfies the mind of the judge that there is a sufficient description with legal certainty: see Vice-Chancellor Wigram's Treatise on Extrinsic Evidence, prop. 7, pl. 186, for example; where a testator devised to Mary, Elizabeth and Ann, the three daughters of Mary Brynon, and at the date of the will Mary Brynon had two legitimate daughters, and one illegitimate daughter, Elizabeth. Parol evidence was admitted to show that Mary Brynon had formerly had a legitimate daughter Elizabeth, who died an infant; and, although it was considered that the legitimate daughter was *primâ facie* the person intended, the other facts and circumstances were left to the jury to say which of the two Elizabeths was intended to be described: *Doe d. Thomas* v. *Brynon*, 12 A. & E. 431. The present case is also somewhat similar in principle to *Bennett* v. *Marshall*, 2 K. & J. 740, where, a devise being "to my second cousin, William Marshall," and the testator had no second cousin of that name, but had a first cousin once removed named William Marshall, and a first cousin once removed named William John Robert Blandford Marshall, it was considered by the present Lord Chancellor that, as it was a common practice, where a person has several Christian names, to call him by the first of those names only, a sufficient case of ambiguity was made out to call for parol evidence in order to ascertain which of the two parties was intended. Upon such evidence the decision in that case was in favor of the cousin with the several names; the Vice Chancellor remarking that, if the evidence had been perfectly balanced, the cousin named William only would have been entitled to the preference. So here, if the parol evidence were equally balanced, we might probably hold that the plaintiff would be entitled in preference to the defendant; but this cannot affect the question of the admissibility of the evidence. Another instance of effect being given to what was considered popular language used by a testator occurs in the case of *Doe d. Gains* v. *Rouse*, 5 C. B. 422, where the testator, who had a wife Mary, to whom he was married in 1834, and who survived him, in 1840 went through the ceremony of marriage with a woman whose Christian name was Caroline, and who continued to reside with him to the time of his death. By his will he devised certain property to "my dear wife Caroline her heirs &c. absolutely;" and the court held that Caroline took under this devise, notwithstanding the entire description was not applicable to her, the description being sufficient in a popular sense.

But there is another ground upon which it appears to us that the defendant may endeavour to bring himself within the description in the will—viz., that the testator was in the habit of calling him his nephew Joseph Grant In all cases of wills, the surrounding circumstances as they existed at the time of the will, including the state of the testator's family and the nature of his property, may generally be proved in order to place the court as nearly as possible in the same condition as the testator, so that they may understand the language of his will, and apply it in the same sense in which he used it. We are of opinion that evidence may be given of a testator having been in the habit of using expressions in a particular sense; though whether such evidence will affect the will, or its application, will depend upon the particular circumstances and the language of the devise in each case; and it would not generally be admissible to alter the natural meaning and legal effect and construction of the words, where they have a definite and clear meaning. In *Richardson* v. *Watson*, 4 B. & Ad. 799, where a question arose as to what was intended under a devise of "the close in the occupation of Watson," Lord Wensleydale said, "Generally speaking, evidence might be given to show that the testator used the word, 'close' in the sense which it bore in the county where the property was situate, as denoting a farm;" though in the particular case it was held that such evidence was not admissible, because the other parts of the will showed that the testator had used the expression in its ordinary sense, as denoting an enclosure only. This subject was much considered by the Court of Exchequer in the case of *Doe d. Hiscocks* v. *Hiscocks*, 5 M. & W. 363, and the following passage occurs in the judgment at page 368: "Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will." In *Crosthwaite* v. *Dean*, 16 W. R. 855, where a devise was to Charlotte Lee, evidence was admitted by the present Lord Chancellor to show that a person who originally bore that name, but had married a person of the name of Antrim, from whom she was afterwards separated, was habitually called by the testator by her maiden name of Lee. In *Goodinge* v. *Goodinge*, 1 Ves. Sen. 281, where the devise was to certain "poor relations," evidence was admitted of the testator having poor relations in Salop, and that he knew thereof; and Lord Hardwick thus referred to another case—"As where the testator described a legatee by a wrong name, which she never bore, parol evidence was allowed by the Master of the Rolls to show that the testator knew such a person, and used to call her by a nickname." In *Beachcroft* v. *Beachcroft*, 1 Mad. 488, the case thus referred to is said to be the case of *Beaumont* v. *Fell*, 2 P. Wms. 140, where the bequest was to Catharine Earnley, and a person named Gertrude Yardley claimed to be the person described; evidence was admitted to show that the testator usually called Gertrude "Gatty," and that, whilst giving instructions for his will, he spoke in so feeble a voice that the attorney's clerk might easily have mistaken the names. In *Beachcroft* v. *Beachcroft* (*ubi supra*), the bequest was, "to my children the sum of pounds sterling 5000 each." It was contended that this could apply only to legitimate children, and that, as the testator died unmarried, the legacy did not take effect. But evidence was admitted that the testator had illegitimate children, born in India previous to the making of the will; that he was much attached to them, and had sent them to England to be educated. Upon this, the Vice-Chancellor decreed that the legacies applied to them. He says, "If there is a latent ambiguity, evidence is admissible to show who the testator was in the habit of considering in the character described in the will." When it appeared on the face of the will itself that, in some parts of it, the testatrix had used the term "nieces" to describe her great nieces, a similar construction was placed upon the words "nephews and nieces" in another part of the same will, so as to include great nephews and nieces, though in that case it did not depend upon extrinsic evidence: *James* v. *Smith*, 14 Sim. 214. If then this head of evidence be admissible, as we think it is, it distinctly appears from the case, that the testator was in the habit of calling the defendant his nephew; and, as his name was Joseph Grant, he would in this view also answer the description in the testator's will of "my nephew Joseph Grant." The defendant has thus, as it seems to us, satisfactorily shown that the words of the will may apply either to him or to the plaintiff; and then, as there is nothing in the will itself, or upon the evidence to which we have hitherto adverted, to show which of them was the person intended to be described, and to whom the testator intended the words to apply, the further parol evidence as to the testator's knowledge and other circumstances became admissible, and upon such of that evidence as was properly admissible it is not disputed that the defendant was in fact the person intended to be described by the testator. Under these circumstances, the parol evidence being admissible for the purposes and in the manner which we have pointed out, we think it exposed a latent ambiguity, and equally removed it, and enables us to understand the language of the will, and to apply it as the testator is clearly shown to have intended it, that is, in favor of the defendant. This view is in accordance with the decision of Lord Penzance, and we give our judgment for the defendant.

*Judgment for the defendant.*

## UNITED STATES REPORTS.

### REGISTER'S COURT.

### In re Estate of George A. Alter, Deceased.

A husband and wife made wills in each other's favor, but by mistake each signed the will of the other. After the death of the husband an act of Assembly was passed, giving the Register's Court the power of a Court of Chancery, and authorising it, at the petition of the wife, to reform the paper and admit it to probate on proof of the alleged mistake. On the filing of the petition authorized, *Held:*

1. That the jurisdiction of Chancery would only attach after probate.
2. That it has jurisdiction only to construe or reform an instrument already made; it cannot execute one.

3. The will in this instance is a manifest absurdity, as it purports to give all the property of the wife to herself, and the real and personal estate of S. A. Alter vested on his death in his heirs-at-law and distributees under the intestate acts, and no special legislation could divest their rights; as against them it was unconstitutional.

[*Philadelphia Legal Gazette*, June 12, 1870.]

Sur petition to reform will.

Opinion by Ludlow, J., delivered June 18th, 1870.

George A. Alter and Catharine, his wife, each determined to make a will, and each intended to give to the survivor the property he or she possessed. Two wills were prepared for execution, and, as was supposed, were duly executed, and then placed in separate envelopes. The husband died, and, on an examination of the envelope containing, as was thought, his will, it was discovered that the husband had signed his wife's will, and the wife had signed the husband's will.

In this dilemma the wife obtained legislation, and an act of Assembly was passed authorizing her to file a petition stating the facts, and upon proof of "the alleged mistake" to the satisfaction of the Register's Court, that tribunal is clothed with "the powers of a Court of Chancery," and is authorised "to reform said paper-writing," and "to have entered in the office for the Register of Wills in and for the city and county, the said paper-writing, which he (George A. Alter) intended to execute as his last will and testament, as if the said writing had been signed by him, with his own hand and seal, and not by his said wife Catharine."

The petition contemplated by the act of Assembly has been filed, notice was duly given to the heirs-at-law of the decedent, and they resist this application. It ought further to be added that the wife of George A. Alter not only survived her husband, but is now alive; and we have no doubt, as a matter of fact, that a clear mistake was made in the execution of these papers.

We will be best able to perform our duty if we first determine what, exactly, we are asked to do in this case. Clearly we are, in general terms, to reform a last will and testament; but which will is to be reformed? Undoubtedly the will which has been executed by the wife in due form of law, and which is upon its face a testamentary disposition of property, by a woman who is now alive, and whose will is therefore ambulatory until her death. Nor is this all. We must go further, and by virtue of a legislative edict strike out, in fact and in law, the name of the wife, and thus execute a will for a dead man.

Such legislation as this was, we think, never before heard of, and if it can stand the test of judicial criticism will work a revolution in our law.

For the following reasons we think the act is fatally defective:

1. If a Court of Chancery ever had jurisdiction in matters of probate, that power is now considered to be obsolete. Spencer's Eq. Juris., ch. vi., p. 701; Adams' Eq., ch. iv., p 248-9; Ib. 178. Nor can jurisdiction attach until after probate: *Allen* v. *McRierson*, 1 H. L. Cases, 191; Story's Eq. Juris., sec. 140; see also Ib. ch. xxxix., sec. 1445-7.

And a court of equity cannot in any event dispense with the regulations prescribed by the legislature as it regards formalities necessary in the execution of wills: 1 Fremm. ch. 130. Adams in his work, commenting upon this point, declares that "a will cannot be corrected by evidence of mistake so as to supply a clause or word inadvertently omitted by the drawer or copier, for there can be no will without the statutory forms." And this principle is correctly stated if we regard it as applying to the formalities required by statute. Story, in his work upon equity, remarks: "It will be found, we think, upon examination, that American courts of equity have not interfered to correct alleged mistakes in the execution of wills, either as to statutory requisites or the manner of writing, as by inserting the name of another legatee." and adds: "The extent to which the English equity courts have sometimes carried this branch of their remedial powers, has more the appearance of making wills as they (testators) probably would do if now alive, than carrying them into effect as they were in fact made:" 1 Story Eq., sec. 180 (*a*). It is well settled that Chancery never relieves against a statute: Comyn's Dig., tit. Chancery, 8 F., 6, 7, 8; Sedgwick's Stat. and Const. Law, 104.

In the further investigation of the subject it is to be remarked, that among the host of cases cited by counsel for the wife, not one of them is at all like this cause, and for the reason, that while deeds, contracts, and wills have been reformed, the effort has invariably been made to find out an intention in an instrument having a legal existence, and not to execute a paper. Hence it has been wisely said, "In the construction of wills indulgence has been shown to the ignorance, unskilfulness, and even negligence of testators, and no degree of technical informality, or of grammatical or orthographical error, will deter the court from giving effect to an intention;" but it is to be observed that in every case which has come to our knowledge, a will, duly executed, has been before a court of law or of equity. A diligent search has failed to produce a single instance in which a court of law or of equity has ever executed a will, while in a case reported in 14 Jurist, 402, the Prerogative Court in England refused probate in a cause precisely similar to this one, except that the parties executing the supposed wills were sisters, and not husband and wife. It is thus reported:—

"Harding applied for probate of the will of the deceased to be granted, the signatures of the two wills being respectively restored to their original state, on a suggestion that a court of equity might put a construction on the contents of the will now before the court.

"Sir H. Jenner Fust—Two ladies lived together, and they determined to make what I may call mutual wills. The wills are the same *mutatis mutandis;* they were drawn up and executed, that is, if executed they are, at one and the same time, but unfortunately each signed the other's will. After the death of one of them the solicitor alters them, so as to make of one of them appear as that of the other, and I need scarcely say that he has erred in so doing. But what is to be done with this paper? It is not the will of the deceased, and it purports to give all her property to herself—a manifest absurdity. I must reject the motion."

If we are not much mistaken, it was a vain thing to endeavor to clothe the Register's Court, in this case, with Chancery powers, for it is evident that courts of Chancery have no such jurisdiction as is now contended for.

2. It has, however, been argued that legislation in this instance cured all defects, for we may consider, under the act, evidence of intention in a case in which there is no latent ambiguity; and, secondly, this act of Assembly has repealed in effect and for the purposes of this case our statute of wills.

It is too clear for argument that, in the present condition of our law, the evidence produced in this case would have been rejected but for this statute, because, as we have before said, there is here no latent ambiguity; and, possibly, legislative authority might have been all powerful but for article 9 in our Bill of Rights, which declares, among other things, that no man can be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land," and this article presents to this petitioner an insurmountable barrier. In *Norman* v. *Heish*, 5 W. & S. 178, when the attempt was made to give an inheritable source, as well as descendible quality, to the blood of one Christopher Norman, which it did not possess while he lived, the Chief Justice, commenting on the section of the declaration of rights above quoted, says, with a power the force of which can now be appreciated: "What law? undoubtedly a pre-existent rule of conduct declarative of a penalty for a prohibited act; not an *ex post facto* rescript or decree made for the occasion.

"The design of the convention was to exclude arbitrary power from every branch of the Government, and there would be no exclusion of it if such rescripts or decrees were allowed to take effect in the form of a statute. The right of property has no foundation or security but the law, and when the Legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen will be no more."

What proposition can be clearer than that at the moment the breath went out of the body of George A. Alter, his estate, real and personal, vested, in full property, in his heirs-at-law and distributees under the intestate law of Pennsylvania? It is true he may have intended to execute a will, but he did not in fact do so; he signed a paper, but not his will; and the case is not harder than that of a person who, in disregard of our statute of wills, signs his name at the top in place of the end thereof, or who adds a codicil and does not execute it, or who dies while his professional adviser is preparing his will.

This is a hard case, but the injury which would be inflicted upon society by giving effect to this act would be infinitely greater than any evil which will flow from a disregard of it. And the time has not yet arrived when by any process of legal ingenuity, aided by legislative action, the property of one man can be arbitrarily given to another by any "rescript or decree," as Chief Justice Gibson calls it, such as is presented to our notice in this case.

Without power at law or in equity to aid this petitioner, and with a constitutional provision staring us in the face, we must decline to grant the prayer of this petition.

*Petition dismissed.*

## GENERAL CORRESPONDENCE.

### *Insolvency—Confirmation.*

To the Editors of the Law Journal.

Gentlemen:—Would you kindly state in your next issue what is the practice in the courts of insolvency in your Province under the "Insolvent Act of 1869" in reference to the confirmation of deeds of discharge, or of composition and discharge in cases where there is no opposition, or the opposition is withdrawn before the application for confirmation is made. If you have any decisions bearing on this point of practice please state the gist of them also.

I am led to make this inquiry because a contention has arisen in this Province in reference to the course to be pursued when a consent to a discharge by the creditors has been given, and under it the insolvent applies for an order of confirmation. The contention on one side is that in a case of this kind, if no opposition to such discharge be made, or, if made, is withdrawn before the application for confirmation is made, no order for confirmation is required—that the Act does not contemplate an order to confirm in a case of this kind—that being essential only where the opposition to the discharge is persisted in and an argument thereon is had before the Judge of the Court—and further that a reconveyance by the assignee to the insolvent is alone necessary, and that the words in the 97th section of the Act, "the assignee shall act on said deed of composition and discharge according to its terms, clearly mean a reconveyance only and exclude the idea of a subsequent order to confirm. The contention on the other side is that an order, with recitals, to confirm a discharge is essential and contemplated by the Act to be given in all cases.

A Subscriber.

Halifax, N. S., Aug. 4, 1870.

[We will answer the above letter next month—Eds. L. J.]

To the Editors of the Law Journal

Gentlemen:—Would you oblige by an answer to the following: Can a person appealing from a decision of a magistrate for selling liquor on Sunday, elect to have a jury. By the Tavern and Shop Licenses Act of 1868-69, Ontario, sec. 36, it provides: "But every such appeal shall be tried by the chairman of the said court without a jury;" but, by the 66th section of 32 & 33 Vic. cap. 31, Dominion, it is provided that on an appeal, &c. "may, at the request of either appellant or respondent, empanel a jury, &c."

An answer in your next will oblige,

Yours, ———.

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To the Editors of the Law Journal.

Gentlemen:—Can a City Alderman, who has qualified as magistrate, issue a Police Court Summons, since the passing of section eleven of the Law Reform Act, except in case of the illness or absence, or at the request in writing of the Police Magistrate. One Police Magistrate holds he can, and that the clause only applies to proceedings subsequent to the summons. Your opinion would oblige,

Yours, ———.

[We are are always glad to help correspondents, who are subscribers, but the courtesy should be mutual,—if it can be called *courtesy*, either in the first place to become a subscriber, or in the second, to pay the small annual subscription we require.—Eds. L. J.]

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**Challenging the Array.**—On the evening of the trial my second brother, Henry French Barrington, a gentleman of considerable estate, of good temper, but irresistible impetuosity, came to me. He was a complete country gentleman, utterly ignorant of the law, its terms and proceedings; and as I was the first of my name who had ever followed any profession, the army excepted, my opinion, so soon as I became a counsellor, was considered by him as oracular. Having called me aside out of the bar-room, my brother seemed greatly agitated, and informed me that a friend of ours, who had seen the jury list, declared that it had been decidedly packed! He asked me what he ought to do. I told him we should have "challenged the array." "That was my own opinion, Jonah," said he, "and I will do it now!"

He said no more, but departed instantly, and I did not think again upon the subject. An hour after, however, my brother sent in a second request to see me. I found him, to all appearances, quite cool and tranquil. "I have done it," cried he, exultingly, "'twas better late than never," and with that he produced from his coat pocket a long queue and a handful of powdered curls. "See here!" continued he, "the cowardly rascal!"

"Heavens!" cried I, "French, are you mad?"

"Mad!" replied he, "no, no! I followed your advice exactly. I went directly after I left you to the grand jury-room to 'challenge the array,' and there I challenged the head of the array, that cowardly Lyons! He peremptorily refused to fight me, so I knocked him down before the grand jury and cut off his curls and tail; see, here they are, the rascal, and my brother Jack is gone to flog the sub sheriff"—*Barrington's Sketches.*

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## AUTUMN CIRCUITS, 1870.

**Eastern.**—*The Hon. the Chief Justice of the Common Pleas.*

| | | | |
|---|---|---|---|
| Pembroke | Wednesday | Sept. | 28. |
| Ottawa | Monday | Oct. | 3. |
| L'Original | Monday | " | 10. |
| Cornwall | Thursday | " | 13. |
| Brockvile | Tuesday | " | 18. |
| Perth | Monday | " | 24. |
| Kingston | Thursday | Nov. | 3. |

**Midland**—*Hon. Mr. Justice Galt.*

| | | | |
|---|---|---|---|
| Napanee | Tuesday | Sept. | 27. |
| Picton | Tuesday | Oct. | 4. |
| Belleville | Friday | " | 7. |
| Whitby | Tuesday | " | 18. |
| Lindsay | Tuesday | " | 25. |
| Peterborough | Tuesday | Nov. | 1. |
| Cobourg | Tuesday | " | 8. |

**Niagara.**—*Hon. Mr. Justice Gwynne.*

| | | | |
|---|---|---|---|
| Owen Sound | Tuesday | Sept. | 13. |
| St. Catharines | Monday | " | 19. |
| Welland | Monday | " | 26. |
| Barrie | Monday | Oct. | 3. |
| Milton | Wednesday | " | 26. |
| Hamilton | Monday | " | 31. |

**Oxford.**—*Hon. Mr. Justice Morrison.*

| | | | |
|---|---|---|---|
| Cayuga | Wednesday | Sept. | 28. |
| Simcoe | Monday | Oct. | 3. |
| Berlin | Wednesday | " | 12. |
| Stratford | Monday | " | 17. |
| Woodstock | Monday | " | 24. |
| Guelph | Monday | " | 31. |
| Brantford | Monday | Nov. | 7. |

**Western.**—*Hon. Mr. Justice Wilson.*

| | | | |
|---|---|---|---|
| Walkerton | Wednesday | Sept. | 21. |
| Goderich | Monday | " | 26. |
| Sarnia | Tuesday | Oct. | 4. |
| St. Thomas | Wednesday | " | 12. |
| London | Monday | " | 17. |
| Chatham | Monday | " | 31. |
| Sandwich | Monday | Nov. | 7. |

**Home.**—*The Hon. the Chief Justice of Ontario.*

| | | | |
|---|---|---|---|
| Brampton | Tuesday | Sept. | 27. |
| Toronto | Tuesday | Oct. | 11. |

## TO CORRESPONDENTS.

"Lex."—We cannot depart from our rule not to insert letters not accompanied by the name of the writer.

THE

Canada Law Journal.

SEPTEMBER, 1870.

## BENCH AND BAR.

Those of the profession who took advantage of the long vacation and the demise of Trinity Term, to recruit their exhausted energies by voyages, long or short as the case might be, have returned, and again tackled to work. The Chief Justice of the Common Pleas, after his trip across the ocean, looks all the better for a brief sojourn in his native land. We trust the Chief Justice of Ontario is also better for his holiday, but it is certain that he must be careful not to overtax his strength, though he will be sorely tempted to take his full share of duty in the overworked Court of Queen's Bench.

The season's business—to use a mercantile phrase—has opened with a fair share of work in Chambers, indicative of the state of litigation in the country, and practitioners have awakened to the fact that the Assizes are upon them, and that applications for changes of venue, the settlement of pleas, security for costs, putting off trials, &c., have to be made and met without further delay, and in a space of time sometimes short from necessity, but often from procrastination. It is, however, well to know that, under the present mode of conducting Chamber business, the interests of suitors will suffer as little as possible, and less than was possible when a Judge was obtainable (during assize time) only at intervals, and then with but a few moments to devote to each case brought before him.

All parties—Judges, lawyers and suitors—are great gainers by the recent appointment of Mr. Dalton. But when we say *all* parties, we cannot include the Clerk of the Queen's Bench himself; for we understand that he receives no remuneration whatever for his increased labours. Probably many are not aware of this, but it is well that it should be known, so that it may be remedied. It may be assumed that Mr. Dalton received sufficient remuneration but no more for his services as Clerk of the Queen's Bench. When, therefore, his duties are practically doubled, and when these added duties can only be satisfactorily performed by a sound painstaking and experienced lawyer, it is only reasonable to expect that additional and adequate salary should be provided for the person doing the duty. When we consider, also, that the work, which was formerly divided among the six Judges, and was then complained of by some at least of them as too great a tax on time fully occupied with other duties, is now done by one person, it is not too much to suppose that a proper representation of the matter to the energetic, albeit economical head of the Government of Ontario, would put the matter right. One thing is certain—that the profession would not, after the relief they have experienced, tolerate a return to the inconvenience and hindrance to business resulting from the absence and other engagements of the Judges during Assize term.

There is another matter which it may not be amiss to refer to, when speaking of Chamber business, and it is this—though the bulk of it may be and is done before Mr. Dalton, there are very many matters of importance which can only be dealt with by the Judges themselves. And it often happens that there is difficulty in obtaining the services of a Judge, not from any desire on their part to shirk their work, but from their being no arrangement or system to enable parties to obtain a hearing before a judge without great loss of time, trouble and expense to practitioners and suitors. We admit the difficulty of providing adequate relief in the premises, but there is certainly a defect in the present system which should if possible be remedied.

One practicable remedy, so far as it goes, would be to enlarge the jurisdiction of the Clerk of the Crown as to some matters—indeed as to all except two classes of cases—1. Those relating to the liberty of the subject, which are excluded by the Act; and 2. That class of cases, such as appeals in Insolvency, motions for prohibition, and the like, which assume a jurisdiction over the Judges of the County Courts. That, we presume, could not be given to an officer of the Court with due regard to propriety and what philosopher Square calls the "eternal fitness of things." It might also be arranged that one of the Judges should be in his room at Osgoode Hall one or more days in the week, to hear cases which must necessarily be heard before a Judge.

## SELECTIONS.

### ADVICE TO LAW STUDENTS.

"Be honest with the court. I have said that you will be subjected to great temptations. In your early causes you will be far more anxious, and more deeply interested to succeed, than your client. To him it may be ten dollars, or fifty, or a hundred or two: with you it is success or failure, the admiration or the contempt of the bystanders, life or death professionally. In this fearful anxiety you will be sorely tried and tempted to conceal your blunders by coloring the facts, and to win your cause no matter how. I say you will be *tempted* to do this but I assume that you will have the manhood and integrity to rise above the temptation. If not, your failure at the bar is certain. A man who has never been tempted may be honest merely; but virtue, in the profession or out of it, is the fruit of temptation suffered, but overcome. Honesty is the best policy, and no man sees this proverb illustrated so frequently, and so vividly, as the lawyer. A trick or a falsehood may win a point or save a cause; but it is certain of discovery, and it will cost its author ten years of honest practice to allay the indignation it will excite in the breast of an honest judge.

"Be always deferential and respectful to the court. Meet their rulings, no matter how adverse or erroneous with the true dignity of professional obedience. But while you are always respectful, be always firm. Courts are composed of judges; judges are men; men who dine out late of nights; they come reluctantly at the summons of the court bell from an unfinished sleep; they are overworked, they are poorly paid and occasionally come to the bench in that impatient and petulant mood which 'sometime hath its hour with every man.' A judge in such a mood will 'whistle your case down the wind' before he has heard the first half of it. Under such circumstances, while you are to be courteous to the court, you must be as firm as a rock The best course for obtaining your rights before an impatient judge, is to acquire the art of clear and concise narration. In motions made, and incidental questions arising in a cause, half are decided erroneously, because the court does not understand the facts, or the state of the record, upon which the decision depends. I think one of the great deficiencies of the profession in daily practice, is the want of this art. To train yourselves in this particular, study the best models of historic composition. Take Kinglake's history of the Crimean war for example, and read the one or two hundred pages in which he describes the charge of the Light Brigade at Balaklava. Notice the innumerable incidents and trifling occurrences, and mark the consummate art with which they are so grouped and arranged as never to obstruct, but always to heighten the effect of the general narrative. The facts of a case before a jury may be very voluminous and very complicated, and there is nothing which so severely taxes the skill of a master as to make every fact available without so burdening the mind of the jury that they will forget the facts altogether. The most trifling and insignificant fact which is yet important enough to be given in evidence, should be brought to the mind of the jury in the argument of the cause; but the facts should be so marshalled with regard to subjects and order of time, that the jury can see the precise bearing of each. In an argument to the jury the facts should be stated by chapter and verse, presented by scene and act, as in Othello, one of the most artistic of Shakspeare's plays, where the least circumstance, even Desdemona's dropping her handkerchief, is made to contribute powerfully to the final and fatal catastrophe.

"Another important matter is the examination of witnesses. I believe that more causes are lost from unskilful examination of witnesses than from all other species of malpractice combined. Always know what your witness is called to prove; direct his mind to that particular object; get through with him as quickly as possible. In cross-examining witnesses, if I were to lay down one, and an invariable rule, it would be not to cross-examine at all. In nine cases out of ten, where a witness testifies against you, your cross-examination will make a bad matter worse. If you believe a witness is honest, and only mistaken, treat him courteously, never touch his pride, nor put him on the defensive. If you believe he is swearing falsely, go down upon him like an avalanche. In ordinary cases never put a question in cross-examination, unless it be to call out some new fact favourable to you; and even then, I think you had better wait and call him as your own witness, and thus win his favor by showing confidence in his integrity; and thus you will frequently get from him very comforting things."—*Extract from an address of Hon. M. H. Carpenter to the Columbian Law College.*

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The New Lord Justice of Appeal.—Mr. George Mellish, the new Lord Justice of Appeal in Chancery who received the honour of knighthood on Tuesday, is the son of the late Very Rev. Dr Mellish, Dean of Hereford, and was born in the year 1814. He was educated at Eton and at University College, Oxford, where he took his Bachelor,s degree in 1837, and proceeded M. A. in 1839; he was called to the bar at the Inner Temple in 1848, and for some years went the Northern Circuit. In 1861 he was appointed a Q. C., and he has now been elevated to the bench, in the place of the late Right Hon. Sir George M. Giffard, as Lord Justice of Appeal, and sworn a member of the Privy Council.

## CANADA REPORTS.

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## ONTARIO.

### COMMON LAW CHAMBERS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### In re Richard B. Caldwell.

*Extradition—Habeas Corpus—Forgery—Warrant—Evidence of accomplice.*

*Held:* 1. It is not necessary under the Extradition Treaty and Act, that an original warrant should have been granted in the United States, for the apprehension in this country of the person accused, to enable proceedings to be effectively taken against him in this Province for an offence within the treaty.

2. The evidence of accomplices is sufficient to establish a charge for the purposes of extradition.

3. Where the crime comes within the treaty, it is immaterial whether it is, according to the laws of the United States, only a misdemeanour and not a felony.

4. A magistrate here holding an investigation for the purpose of extradition should not go beyond a bare enquiry as to the *primâ facie* criminality of the accused, and should not enquire into matters of defence which do not affect such criminality.

[Chambers, March 25, 1870—*A. Wilson, J.*]

A writ of *habeas corpus* was obtained on behalf of the prisoner, directed to the Sheriff of the County of York and others.

The return stated that the prisoner was detained under the warrant of the police magistrate of the City of Toronto, on a charge of forgery committed in the United States, against the laws of that country.

*J. H. Cameron*, Q. C., for the prisoner, urged the following points in favour of his discharge.

1. There was no charge made in the United States before or since this charge.

2. The charge is only on the evidence of an accomplice.

3. The offence charged is not forgery within the law of the United States.

4. The charge is not within the treaty, and is condoned by a statute of limitation in the United States, which period (two years) had expired before the charge was made.

See 1 Parker, Crim. Rep. 108: *Ex parte Martin*, 4 C. L. J. N. S., 198; 29–30 Vic. cap. 45, sec. 8.

*M. C. Cameron*, Q. C., *contra.*

The remedy is not by habeas corpus.

It is not necessary that the charge should have been made in the United States before proceeding here: *Reg.* v. *Anderson*, 4 C. L. J. N. S., 315; *Ex parte Martin, ubi sup.*: *The Queen* v. *Gould*, 20 U. C. C. P., 154.

Fugitives from justice are not entitled to the benefit of the limitation claimed, 5 Cranch 87; 1 Wharton's Am. Law, sec. 436.

The case was argued before Mr. Justice Adam Wilson, who prepared the following judgment, which, however, was delivered by the Chief Justice of the Common Pleas during the absence of the former learned judge on circuit.

A. Wilson, J.—It was objected that no charge had been made in the United States against the prisoner for the alleged offence, and that until criminal proceedings had been taken there, none could properly, under the treaty and our statutes passed for giving effect to the same, be initiated here.

The statute of the Dominion, 31 Vic. cap. 94, (Reserved Act; see 32, 33 Vic. p. xi ) reciting the treaty, refers to "persons who being charged with the crime of murder, &c., within the jurisdiction of the high contracting parties, should seek an asylum, or should be found within the territories of the other, provided that this should only be done upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed, &c."

The *charge* may therefore be made within the jurisdiction of *either* of the high contracting parties, in case the evidence of criminality, "according to the laws of the place where the fugitive or person *so charged* should be found, would justify his apprehension and commitment for trial if the crime or offence had *been there* committed." The language of the enacting part, (sec. 1) is to the same effect.

I should have thought that the statute permitted a charge to be made here against a person who had committed an offence within the treaty in the United States of America, although no charge had been begun there against the person for that offence, and I should have thought it to be free from all doubt but for the second section of the act, which enacts, that "In every case of complaint and of a hearing on the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified, &c., may be received in evidence of the criminality of the person so apprehended." The Con. Stat. of Canada, ch. 89, sec. 2, referred to the original warrant, not as the warrant that *was* granted, but which "*may have been granted*"

I do not, however, consider the statute to require that no charge should be laid here, when the offence has been committed in the United States, until a warrant has been granted there.

The legal functionary is bound to act here "on complaint under oath or affirmation charging any person, &c.," with one of the treaty offences. And when the person charged is brought before the judge or other person who directed the arrest, the judge or other person is to examine on oath, "any person or persons touching the truth of the charge, and upon such evidence as according to the laws of this Province, would justify the apprehension and committal for trial of the person accused, if the crime had been committed here, the judge or other person shall issue his warrant for the commitment of the person charged, to remain until surrendered or duly discharged."

The judge or other person acting may proceed upon original *vivâ voce* testimony in like manner "as if the crime had been committed in this province." He may, however, also receive copies of the depositions on which the original warrant was issued in the United States in evidence of the criminality of the accused.

This, however, is an enabling act. There is no obligation on the prosecutor to produce such depositions. And I do not conceive that the statute requires there shall be first such depositions taken, and a warrant granted thereon in the United States, to give jurisdiction to the magistrate here.

The purpose of the statute was to permit the foreign evidence to be made use of here, and not to make it obligatory in the foreign country to have issued a warrant against the offender as a basis for our authority to act.

When once the foreign officers have the person accused surrendered to them for removal from this country it must be for themselves to justify their detention of the person in their own country.

It may be that in cases of felony there the detention may be justified by any one in like manner, and to the like extent that it may be justified here without a warrant at all. But whether it can or cannot, or whether the offence is there a felony or not, can make no difference here.

Our concern must be to deal with these foreign offences in our own country in like manner as if they had been committed here: to enforce the treaty effectually and in good faith, and to leave all questions of municipal law between the foreign authorities and their prisoner to be dealt with and settled by their own system with which in that respect we have nothing whatever to do.

I am therefore of opinion, that it was not necessary that an original warrant should have been granted in the United States for the apprehension of the person accused, to enable proceedings to be effectually taken against him in this Province, for an offence within the laws of the treaty.

The second objection was, that the direct evidence of criminality was that of two accomplices, and that such evidence was not sufficient to establish the charge without proper corroborative testimony.

I do not attribute much weight to this objection, the evidence of accomplices is admissible, and jurors may when the rule of law with respect to such persons has been explained to them, find a verdict on the evidence of accomplices alone. Justices holding such preliminary investigations, may assuredly do so, when the question is whether the accused shall be put upon his trial or not; and when all such questions, as to how far his accomplices are to be credited, will be duly and at the proper time considered, the objection is not sustainable.

It was thirdly alleged, that the facts did not shew that the offence of forgery had been committed. It appears to me the offence has been sufficiently charged and proved to constitute the crime of forgery.

If it be under the act of 1823 (see Laws of the United States, Dunlop, p. 678, ch. 88), the offence is a felony.

If it be under the act of 1863 (see United States Statutes at Large, 37th Congress, ch. 67), the offence will I presume be a misdemeanour.

And if it be under the act of 1866, 39 Congress, ch. 24, it is a felony.

But whether a felony or misdemeanour can be of no consequence—it is nevertheless the offence of forgery, and it is with that alone that the treaty and the statute deal.

It was lastly objected that the accused could not be legally apprehended here upon the charge, because the offence, if committed at all, was committed more than two years before the complaint was made against him, and by the law of the United States, the lapse of two years was a bar to the criminal prosecution.

The period of limitation was denied. It was said to be five years in cases which affected the United States revenue. If it be restricted to the term of two years, then it was said the case must fail.

It was answered on the other hand that it was a matter of defence only, and the defence might be repelled by showing that the accused was a fugitive from justice.

It appears to me that what the judicial officer in this country has to do, is to determine the *primâ facie* criminality of the accused, to determine whether the evidence is sufficient to sustain the *charge* or not.

It is not by any means determined in the United States whether a demurrer will lie, or a motion in arrest *of judgment* may be made, if the indictment show the offence to have been committed beyond the statutory period.

The accused is at liberty to take the benefit of the limitation under the general issue, and the prosecutor may show in reply, that the accused is not entitled to the benefit of the protection by reason of his flight from justice.

It appears to me it will be very inconvenient if the magistrate here is compelled to go beyond the law of enquiry as to criminality.

Suppose some pardoning statute to be relied on—with many exceptions and special provisions—and the accused claims the benefit of it on the claim for extradition. Is the magistrate to try this collateral question, whether the accused is or is not within its provisions, or has or has not forfeited his claim to its protection?

The limitation is a matter of defence; the accused is entitled to the advantage of it by plea, or by some proceeding in the nature of a plea, and he may be precluded from getting the advantage of itby a proper replication, or by counter evidence in the nature of a replication.

It affects his liability to be prosecuted or convicted, it does not affect his criminality.

On the whole, I think the accused should be remanded generally to the custody from whence he came, to abide the decision of his Excellency the Governor-General under the statute.

*Prisoner remanded.*

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## Hatch v. Rowland.

*Fi. fa.—Stock in incorporated company.*

*Held*, that stock in an incorporated company is only bound from the time when notice of the writ is given to the company by the sheriff under Con. Stat. Can. cap. 70, ss. 3, 4, and not from the time of the delivery of the writ to the sheriff.

[Chambers, March 10, 1870.—*Mr. Dalton.*]

This was an interpleader summons, obtained by the sheriff of the United Counties of Northumberland and Durham.

On the argument, the parties agreed to waive their right to an issue, and to leave the decision of the question in dispute to Mr. Dalton.

The matter in dispute was a small amount of stock in the Port Hope Gas Company, an incorporated company.

It appeared that on the 24th August, 1868, there were standing on the books of the company five and a half shares of its stock, in the name of the defendant, who on that day transferred the stock to James Clarke. It so remained until the 18th October, 1869, when Clarke re-transferred it to the defendant. On the same day the defendant transferred it to the claimant, both the latter transfers being entered in the stock book of the company. This transfer to the claimant was in satisfaction of a judgment which the claimant had recovered against the defendant.

On the 10th January, 1870, the sheriff of Northumberland and Durham served on the secretary of the company a copy of the writ of *fieri facias* against the defendant's goods in this cause, at the suit of the plaintiff, which was then in the sheriff's hands, and had been in his hands continuously to that time from a day previous to the 18th October, 1869, and gave the notice of seizure, pursuant to sec. 8, cap. 70, Con. Stat. of Canada.

*Rae* appeared on behalf of the sheriff.

Mr. Greene (Patterson & Beatty) for the execution creditors.

*McCaul* for the claimant.

Mr. Dalton.—The question is, whether the stock, under the circumstances, was bound from the receipt of the writ by the sheriff; and I think it was not.

By Con. Stat. of Canada, cap. 70, sec. 1, "all shares and dividends of stockholders in incorporated companies shall be held to be personal property."

By sec. 8, the sheriff to whom any writ of execution is addressed, with directions to seize stock, "shall forthwith serve a copy of the writ on such company, with a notice of seizure, &c.; and from the time of such service, *no transfer of such stock by the defendant shall be valid*, until the seizure has been discharged."

Sec. 4 enacts that if a company has a place of business other than that where such notice has been served, such notice shall not affect the validity of any *transfer* or payment of any dividends or profits duly made and entered at such *other place*, so as to subject the company to pay twice, *or to affect the right of any bonâ fide purchaser*, until there has been time to transmit the notice.

As the first section of the act (and section 255 of the C. L. P. Act is to the same effect) declares shares to be personal property, and liable as such to be attached, seized and sold under writs of execution, it would probably be held, but for the other enactments of the statute, that the delivery of the writ of *fieri facias* to the proper sheriff would bind the property, as in the case of other personal property; but the second and third sections seem to show clearly that such is not the intent. It is the necessary implication that until the seizure, in the manner pointed out in the third section, the receipt of the writ by the sheriff cannot affect the rights of a *bonâ fide* purchaser, though he may purchase after such receipt. I should understand by the expression, *bonâ fide* purchaser, a purchaser for good consideration, without notice. I understand the claimant to be such purchaser.

*Robinson* v. *Grange*, 18 U. C. Q. B. 260, is consistent with this, though it does not expressly decide it.

I must therefore make an order declaring the property to be in the claimant Stanton, and protecting the sheriff as against the execution creditor; the execution creditor to pay the costs of the sheriff and of the claimant.

*Order accordingly.*

## NEWFOUNDLAND REPORT.

### SUPREME COURT, NEWFOUNDLAND.

Before the Honorables Hoyles, C. J., Robinson and Hayward, JJ.

(*Reported by* D. Girouard, Esq., *Advocate, Montreal.*)

### Carter et al v. LeMesurier.

*Election committee—Amenable to judicial authority—Writ of prohibition.*

*Held:* That an election committee illegally constituted by the House of Assembly to try the return of members sitting therein, will be prohibited from proceeding in the said enquiry by a *writ of prohibition.*

[St. Johns, Newfoundland, May 20, 1870.]

On the 6th April last, *W. V. Whiteway*, Q C., moved for a writ of prohibition to be directed to Thomas Talbot and others, forming a committee appointed by the House of Assembly of Newfoundland to try the return of F. B. T. Carter and Edward Evans, members for the District of Burin; also to Henry LeMesurier and John Woods, upon whose petition the committee had been named, prohibiting the said committee from proceeding in the said enquiry, and the said petitioners from prosecuting the same.

The grounds of the motion were, that the House of Assembly on the 24th February last, the day appointed for considering the petition of Messrs. LeMesurier and Woods against the return of Messrs. Carter and Evans, omitted to call the House before proceeding with the order of the day, and upon finding that there were not twenty members present besides the speaker, adjourned for a whole week instead of to the following day, as required by law; and that by reason thereof, the said select committee had been illegally constituted and should be restrained from taking further proceedings in the matter

The court refused to order the immediate issuing of the writ, but granted a rule *nisi* upon the petitioners and the committee, with a stay of proceedings in the meantime. An application was then made by Mr. Whiteway for the compulsory examination of the Clerk and Solicitor of the Assembly. This also was refused, but with an intimation, that if the affidavits of these officers were not produced by the other side, the application might be renewed during the progress of the case, should their evidence appear to be necessary for establishing the truth upon any material points in controversy.

Upon the return of the rule, being the last day of April Term, the Attorney General appeared for the petitioners and the committee, and after protesting against the authority of the court to interfere with what, as he alleged, were the proceedings of the Assembly in a matter of which they alone had cognizance, took a preliminary exception to the rule *nisi* as not being in accordance with the terms of the sixth of the practice rules of the Supreme Court, which prescribes that a rule *nisi* to set aside proceedings for irregularity shall state in the rule itself the grounds intended to be relied upon.

The court however were of opinion that the sixth rule had reference only to irregular proceedings in the Supreme and Central Circuit Courts and overruled this objection.

*W. V. Whiteway*, Q.C., in support of the rule.

The writ of prohibition should issue. The Supreme Court of Newfoundland is constituted under the act 5 Geo. IV. cap. 67, and has jurisdiction in Newfoundland and its dependencies as fully and amply, to all intents and purposes, as her Majesty's Courts of Queen's Bench, Common Pleas, Exchequer, and the High Court of Chancery have in England.

There is no court in Her Majesty's Colonies possessing more extensive powers within its jurisdiction than the Supreme Court of this island.

A writ of prohibition will lie to a pretended court, from the Queen's Bench. (*Per* Holt, C. J., in *Chambers* v. *Sir John Jennings*, 2 Salk. 553, Bac. Abr., Tit. *Prohibition*.)

The Queen's Bench may prohibit any court whatever: Viner's Abr. 50. The Courts of Westminster have jurisdiction over all courts, by writs of prohibition: Bac. Abr.; Wharton's Law Lexicon, Tit. *Prohibition*. The Queen's Bench may award prohibition against any Court usurping jurisdiction: Tom. Law Dict., Tit. *Court*. If the Commissioners for determining policies of insurance grasp at more power than they have, the Court of Queen's Bench will prohibit them: Bac. Abr., Tit. *Prohibition*. The Queen's Superior Courts have control and superintendence over inferior jurisdictions, and are to take care that they keep within bounds: Tom. Law Dict., Tit. *Court*; Waddilove's Abr., Tit. *Prohibition*; 2 Inst. 602; 2 Rolles' Abr. 819; 1 Ventris, 73; Fitzherbert's Natura Brevium; *Darby* v. *Cossens*, 1 T. R. 552; Bullen & Leake, 629; 3 Black. Com. 112.

Prohibition issued from the Court of Queen's Bench to Surrogates appointed by the Judge of the Court of Arches, he having exceeded his authority in appointing them: *Martin* v. *McConachie*, Moo. P. C. C., N S. 505.

Hoyles, C. J.—Was not the reason that the Judge who appointed the Commissioners had been counsel in the cause?

*Mr. Whiteway.*—I think that was not the reason for the prohibition. The ground upon which it was obtained was, that the Judge had not power to appoint.

Robinson, J.—Have you filed a suggestion?

*Mr. Whiteway.*—No, my Lord. Under the present practice, filing a suggestion is not necessary: Wharton's Law Lexicon, Tit. *Prohibition*. The practice is there stated.

The Court of Exchequer has power to issue a writ of prohibition to the Judicial Committee of the Privy Council: *Ex parte Smythe*, 2 C. M. & R. 749. Prohibition lies *pro defectu jurisdictionis* as well when a court has jurisdiction and exceeds it, as when it has no jurisdiction: *Smith* v. *Bradley*, Buller's N. P. 219 *b.*; Har. Dig. 8309. When a limited tribunal exercises jurisdiction not belonging to it, its decisions are nugatory: *Attorney-General* v. *Hotham* (*Lord*), 1 Turn. & Russ. 219.

The acts of the Court of Admiralty and of courts martial, may become the subject of an application to the Courts at Westminster for a writ of prohibition: *Grant* v. *Gould*, 2 H. Bl. 101.

An election committee of the House of Commons is a judicial tribunal: Warren's Election Practice, 629, 276, 277; May's Parliamentary Practice, 488, 442; Dwarris on Statutes, 229.

Election committees have, by statute, power to examine on oath, which the constitution denies to the House of Commons, lest that body should thereby attempt to become a court of justice: Bowyer's Com. on Constitutional Law, 90.

An election committee of the House of Assembly is a judicial tribunal, to be constituted by the House under statute 23 Vic. cap. 11, in the manner therein provided, to administer justice, under the sanction of an oath—bound by the law, over which it has no control. Parliament cannot exceed the law: Tom. Law Dict., Tit. *Parliament*; *Coundell* v. *John*, 2 Salk. 504; 4 Inst.

The appointment of an election committee was ruled to be illegal in *Bruyeres* v. *Halcomb*, 3 A. & E. 381. When an action of debt was taken for the costs, under the Speaker's certificate, the defendant objected that the committee was not legally constituted. In reply it was urged that the courts at Westminster could not enquire into the character of the proceedings as regards the appointment in such a case. The court decided that it was bound to enquire into the character of such proceedings, to ascertain whether the tribunal had been constituted according to law; for if not, its acts would be nugatory; the maxim would apply, *debile fundamentum fallit opus*, and in this case the petitioner not having been notified to attend at the time of the drawing of the committee, its constitution was ruled not to be in accordance with the Act 9 Geo. IV., cap. 22, and the plaintiff could not recover.

The learned counsel also referred to the recent Bridgewater cases, of which he stated he had no report, where a *mandamus* was granted to the commissioners appointed to enquire into the bribery charges, ordering protection certificates to be given to witnesses under certain circumstances alleged, showing the powers belonging to and exercised by the Superior Courts.

This statute, 23 Vic. cap. 11, ought to be construed strictly, as it creates a new jurisdiction, according to the authority in Dwarris on Statutes, 652; 10 Rep. 75; Stra. 258.

Affirmative words, if absolute, explicit and peremptory, showing no discretion was intended to be given, especially when jurisdiction is conferred, are imperative: Dwarris on Statutes, 611.

It would be difficult to use words more absolute, explicit and peremptory than those used in this Act.

The word "may," when the statute confers an authority to do a judicial act, is imperative on those so authorised: 11 Com. B. 778, 142, B. 474.

Here the learned counsel commented at length on the provisions of the local Election Act, 23 Vic. cap. 11, and the authorities quoted, and contended that the House of Assembly had appointed seven individuals to act as an election committee, who were presuming to act in the adjudication of the rights of parties, not being legally constituted as a tribunal for that purpose.

*Hon. R J. Pinsent*, also in support of the rule:—No language can be more explicit, clear and imperative than that of the statute under which election committees are to be appointed. It is imperative; it prescribes not the mode of proceeding only in general terms, but that the adjournment shall be to the next day at a particular hour, and so on from day to day, &c. Here the adjournment was for a week. The essential character of the proceeding in principle, and the necessity of its being carried out according to the express words of the law, are manifest. If a judicial decision held otherwise, the consequence would be, for instance, that a number of persons in the Assembly in hostility to the sitting members, professing to adjourn for a week or other given time, might, after the members had dispersed, and as in this case gone to their homes at long distances, profess to hold a legal and competent House according to the statute, and proceed to the appointment of a packed committee, to try the rights of parties who were wholly unconscious of the proceedings. Here, after the House had adjourned for a week, a few persons met next day and professed to be the House of Assembly, with power to declare that something had been done the day before that had never taken place. It was an unprecedented and unheard of action of prerogative. If there be any part of the Act important and essential, this, which went to the foundation of the matter, is that part: *Debile fundamentum fallit opus*.

The learned counsel cited from May's Parliamentary Practice, page 59: "One House cannot create a disability unknown to the law;" page 87, "If orders be made beyond the jurisdiction, the enforcement of them may become a matter liable to question before the Courts of Law;" page 610 (speaking of the administration of the Election Law in England), "Every enactment is positive and compulsory; the House, the Committee, the Speaker, the members, are all directed to execute particular parts of the act; and, in short, it is not possible to conceive a legislative body more strictly bound by a public law over which it has no control, and in administering which it has so little discretion," p. 660, the Court of Chancery interferes by injunction to prevent petitioners proceeding irregularly with private bills before Parliament.

He contended that the House of Commons itself could not contravene the express mode of the statute for the formation of an election committee, without the committee so formed being subject to the process of the Courts of Westminster.

The following cases and authorities were cited in the course of the argument:—The local statutes; *Doyle* v. *Falconer*, 4 Moo. P. C. C., N. S., 203; *Chambers* v. *Jennings*, 1 Salk. 553, as to pretended court; Vin. Abr. 50; *Bruyeres* v. *Halcomb*, 3 A. & E. 381, shewing that certain irregularities in the formation of election committees avoided the recognizance; *Grant* v. *Gould*, 2 H. Bl. 101; Dwarris on Statutes, 611-652, shewing the imperative meaning of the words; also, *Attorney General* v. *Lock*, 8 Atkyns, 166; *Reg.* v. *McCowan*, 11 A. & E. 869-885; *Freeman* v. *Trannah*, 12 C. B. 407; *Reg* v. *Grimshaw*, 10 Q. B. 747; *St. John's College* v. *Todington*, 1 Burr. 193-8; *Rex.* v. *Jolliffe*, 4 T. R. 288; *Reg.* v. *Ledgard*, 1 Q. B. 623; *Gould* v. *Gapper*, 5 East 862-870; *De Haber* v. *Queen of Portugal*, 17 Q. B. 171, and *Wadsworth* v. *Queen of Spain*, 17 Q. B. 196; *Manning* v. *Farquharson*, 30 L. J. Q. B. 22; Addison on Torts, 1033-40; Arch. Prac. 1787; *Eversfield* v. *Newman*, 4 C. B. N. S. 418; Broom's Leg. Max. 843-86.

*Hon. Mr. Little*, Attorney-General, *contra.*—The rule should be discharged on some one or all of the following grounds:

1. The committee being a part of the Assembly itself, and being appointed by that body for the purpose of conducting and determining an inquiry into the claims of certain parties to seats in the House, to prohibit it from proceeding in accordance with the orders of the House would be an illegal interference with the exclusive powers and privileges of the Assembly, for which no authority or precedent could be found.

2. Before applying for a writ of prohibition, the promovents should have appeared in the Court below, which they had not done.

3. Assuming (what he neither admitted nor denied) that there had been no call of the House prior to reading the order of the day on the 24th February, and that the House had adjourned for a week on that day, the commission in the one case, and the proceeding complained of in the other, were mere irregularities which (the words of the statute being directory only and not imperative) could not affect the constitution of the committee.

The irregular adjournment was cured by the House meeting on the 25th of February, and continuing its sittings by regular adjournments until the day when the committee was appointed. In support of this position the Attorney General cited an instance from the Journals of the Assembly of 1852, in which after having adjourned from one day until two o'clock the next day, the Assembly nevertheless met at twelve on that day, by direction of the Speaker, for the purpose of considering as to the relief to be afforded to certain distressed sealers.

4. If, as alleged, the committee was in fact illegally constituted, it was in law no court at all, and a writ of prohibition would not therefore lie to it, and the promovents' remedy was to await its action and institute proceedings only when actually aggrieved.

At the close of the Attorney-General's argument, Mr. Whiteway again moved for the examination of the Clerk and Solicitor of the House, and the Court being of opinion, that owing to the ambiguous and unsatisfactory character of the Speaker's affidavit, some doubt existed as to the fact of the adjournment being to the third of March, such examination was ordered.

On its being entered upon, the Attorney-General, on behalf of his clients, admitted that the adjournment was for a week as alleged; but the inquiry was nevertheless proceeded with for the purpose of informing the court of the circumstances under which the House had, as was stated by the Speaker, met on the following day. It then appeared that on the 24th of February the House was not called over previously to the order of the day being read; that in consequence of there not being twenty members present besides the Speaker, the House had adjourned to the 3rd of March; that after the House rose the legality of this adjournment was doubted, and that in consequence, the Speaker and certain members (three or four, as deposed by the Clerk, at least ten, but not twenty, as stated by the Solicitor) met the next day at the usual time and place, with the view of correcting this mistake, and continued to meet and adjourn daily until the 3rd of March, from which day the House regularly met and adjourned from day to day until the 2nd of April, when, the required number being present, the committee was appointed. It further appeared that the original notes of the proceedings of the 24th of February as taken officially by the clerk, correctly stated the adjournment according to the fact; but that the full journals untruly stated that the House had adjourned to the next day; that the journals were so made up by the Clerk, not of his own accord, but by direction of some whose orders he felt bound to obey, but whose names, the disclosure being objected to by the Attorney General, as irrelevant, did not appear, and that the succeeding Journals up to the 3rd of March were made up on the assumption of continued regular adjournments of the House from day to day.

After the evidence had been given Messrs. Whiteway and Pinsent, in support of the rule, were heard in reply. The Court reserved its decision until the 20th May last, when the following judgment was delivered:—

Hoyles, C. J.—The questions raised for determination, though not of so much difficulty as might at first be supposed, are yet novel and important. Novel, because for reasons presently to be noticed, no case strictly analogous to the present can be found in English jurisprudence, and I cannot learn that any one of a similar character has occurred in any of the colonies; and important, not only because it is supposed to concern the powers and privileges of the House of Assembly, but also by reason of the interests immediately involved in it, since if the rule be discharged, the sitting members may be compelled to defend their seats before a tribunal in which they profess to have no confidence; while if it be made absolute, the petitioners may, without any fault of their own, be deprived of the opportunity of having their claim to seats in the legislature investigated and possibly allowed.

With the novelty or importance of the case, however, we have nothing to do, further than as these circumstances should stimulate us to a more thoughtful consideration of it. Nor may we concern ourselves with the consequences of our decision. Our duty is simply to declare the law as we believe it to be, and in now doing so, it is satisfactory to reflect, that if we should be mistaken in our conclusion, a tribunal is at hand by which our errors may be corrected.

The application which has been made to us is for a writ of prohibition to be directed to an election committee of the House of Assembly to restrain it, and those who are suitors before it, from further proceeding with an enquiry into the Burin election.

This writ is defined to be, "a writ issuing out of Superior Courts at Westminster, directed to the Judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, on the ground that the case does not belong to that jurisdiction" (3 Steph. Com. 686); and it is grantable *ex debito justitiae* (though not of course) upon sufficient grounds: *Jackson and Beaumont*, 11 Ex. 300; *Barder* v. *Veley*, 12 A. & E. 263.

By sec. 1 of the 5 Geo. IV. cap. 67, commonly known as the "Judicature Act," the Supreme Court has within this Colony and its dependencies the same jurisdiction that the Courts at Westminster have in England. An election committee constituted under the local act 23 Vic. cap. 11, for the trial of controverted elections, being a place where justice is judicially administered (Coke on Litt. 68), is undoubtedly a court, and having only a limited jurisdiction (*Mayor of London* v. *Cox*, L. R. 2 H. L. Cas. 239) is an inferior court.

It necessarily follows, that if in the present case sufficient grounds have been shewn for this writ, we are bound to grant it, unless, as is contended by the Attorney General, there is something in the character or constitution of this inferior court, as emanating from the House of Assembly, which limits and supersedes our ordinary authority in this respect.

The case, then, resolves itself into this inquiry,—Is our authority here restricted, as the Attorney General maintains it is, and if not, have sufficient grounds been shown for the issuing of the writ?

To consider these questions in their order—An election committee, although composed entirely of members of the Assembly, chosen and put in motion by that body, is essentially a creature of the law, owing its existence and constitution wholly to an act of the Local Legislature, which declares and defines its functions and duties, and bestows upon it all the powers it possesses. *Prima facie*, then, like all other inferior legal tribunals, it would be subordinate and subject to the control of the law as administered by the Superior Courts. What is there that exempts it from their jurisdiction?

The argument of those who contend for such exemption is, that by reason of its composition, and the subject matter with which it deals, the election of members to the House of Assembly, it is responsible to the Assembly alone, and no other power can lawfully interfere with its proceedings; and it is said that during the whole time, nearly a century, during which the Grenville Acts were in operation, no instance occurred of a prohibition being even applied for against a committee appointed under their provisions, and that in this particular an analogy exists between the Assembly and the House of Commons.

It is to be observed, however, that in *Bruyeres* v. *Halcomb*, 3 A. & E. 88, cited with approval in *Ransom* v. *Dundas*, 3 Bing. N. C. 123, the Court of Queen's Bench reviewed the appointment of an election committee of the House of Commons, chosen under the Imperial Act of 9 Geo. IV. c. 22, on which our act is substantially based; and although it is true that no case can be cited of a prohibition issuing to an election committee of the House of Commons, that is so because, by the *lex et consuetudo Parliamenti*, itself part of the law of England, that House has always, and in a manner peculiar to itself, had and exercised the sole and exclusive power of enquiring into and determining upon the election of its own members: 2 Steph. Com. 368.

But it has been decided too often to be now a matter of doubt or controversy, that the *lex et consuetudo Parliamenti* has no application to Colonial Legislatures. (See *Doyle* v. *Falconer*, and cases there cited, 4 Moore, P. C.C. N.S.203.) And that the powers and privileges of these bodies are such only as, either expressly or by necessary inference, are conferred by the charters, Royal instructions, or other instruments to which they owe their origin, or are given by local enactments in amendment of these instruments (1 Chalmers' Opinions, 233, 263, 296); and I can find nothing in the commission and instructions under which our Legislature was first assembled, or in any of the acts passed in relation to it, which exempts either the Assembly itself or any of its committees from the control of the law or from responsibility for a wrongful act where they exceed their powers; and in the interests of public justice, I feel constrained to add, that having regard to the evidence before us of the manner in which the Journals of the Assembly have been dealt with in this case, and the danger to which, were such proceedings necessarily tolerated, the rights of individuals might be exposed, it would in my opinion be a very great misfortune if either branch of the Legislature had power to commit a private wrong and the courts of justice were powerless to afford redress.

The general principles of the common law, then, giving to the Supreme Court jurisdiction over an election committee, and the special exemption from control which prevails for election committees in England having no existence in this Colony, it is manifest that the Attorney General's contention in this respect cannot prevail, and I have now only to consider the grounds upon which our interference is sought.

The grounds relied upon are, that on the 24th February, the day on which, by the order of the House, the petition was to be taken into consideration, the House was not called previously to reading the order of the day; and that upon its appearing that the required number of members was not present, the House was improperly adjourned until the 3rd of March, instead of to the next day; and these grounds depend for their validity upon the true construction of the 5th sect. of the Local Act, 28 Vic. c. 11, which is as follows: "Previously to reading the order of the day for considering the petition, the House shall be called; and if there shall be less than twenty members present, the House shall forthwith adjourn to a particular hour the next day, when they shall proceed in like manner, and so from day to day, till there be twenty members present at the reading of such order, in which number the Speaker shall not be included."

While it is admitted as a general rule that powers given by statute must be strictly pursued (Viner's Abr., *Tit. Authority*; *Atkins* v. *Kelby*, 11 A. & E. 777; *Roberts* v. *Humby*, 3 M. & W. 125), there is yet a clear distinction between matters merely *directory* and matters *imperative: Reg* v *Loxdale*, 1 Burr. 447. The former, although they ought to be followed, are yet not so necessary as that their non-observance will render void all subsequent proceedings, while matters imperative are such as cannot be dispensed with, without producing that result. To determine whether an enactment is imperative or directory, we must consider the consequences that would flow from disregarding it, whether it is of the essence or substance of the proceedings, or merely formal, and what appears to have been the intention and object of the Legislature with respect to it.

The Attorney General contends that the directions to call the House, and in a certain event, to adjourn to the next day, are not imperative, and that notwithstanding a mistake in or departure from either, the House could at a subsequent time proceed to perfect the committee, and so far as regards the calling of the House, I am at present disposed to agree with him.

The expression "the House shall be called," means, as is evident from the context, not that every member shall be previously summoned, but that the names of those then present shall be called aloud, that it may be certainly known if the number requisite for the appointment of the committee are in attendance. If they are (a fact which may be ascertained with sufficient certainty without a name being mentioned), the object of the Legislature, the securing a competent number from whom to choose, is satisfied, and no possible injury, it seems to me, could arise from their names not having been enumerated aloud. It is not necessary, however, that I should determine this point, because as to the direction to adjourn to the next day, I have a clear and decided opinion that it is absolute and imperative, and of the very substance of the enactment.

This, I think, plainly appears; 1. From a consideration of the importance attached to time throughout the statute; thus, no petition can be presented after so many days; not only a day, but an hour is fixed for its consideration; if the petitioner is not *then* present, the petition shall be further proceeded with; 2. From the evident intention of the Legislature that the proceedings upon the appointment of the committee should be continuous and uninterruped; 3. From the implied prohibition against the transaction of any other business while the appointment of the committee is pending; 4. From a regard to the probable difference in the composition of a committee chosen on one day from what it might be if chosen on another, in consequence of its being to be taken from the members present, who might not be the same on one day as on the next; 5. From the obvious facility with which, by preconcerted adjournments, a committee might be packed, if the time of appointment were in the discretion of the majority present; 6. From the language of the statute being, with reference to the adjournment "*from day to day*," *de die in diem*, that is, from the day then passing to the day next succeeding, the word being used in its natural, legal sense, which would authorize an adjournment only over a *dies non*, such as Sunday; and, 7. From the fact that it seems to have been necessary specially to amend the English Act, to enable the House of Commons to adjourn over certain holidays, in the event of the day preceding them being the day of appointment, and of the requisite number of members not being present on that day.

I must therefore hold, that this case comes within the rule laid down in *Ransom* v. *Dundas*, 8 Bing. N.C. 123, above cited, namely, that if the appointment of the committee takes place in a manner contrary to or inconsistent with the essential requisites of the statute, there is no court, and the jurisdiction and all proceedings under it fail, ahd therefore, that the House of Assembly in adjourning to the third of March, committed a fatal error, working what in a suit at law is known as a discontinuance, which terminates the suit; that the subsequent appointment of the committee was invalid; that the taking of the oath of office by its members with the purpose of proceeding to try the case was nugatory, and that all subsequent proceedings had by them would be *coram non judice* and inoperative.

It is contended, however, by the Attorney General, that, admitting the adjournment for a week to be a violation of the Act, this error could be and was cured by the Speaker, officers, and some of the members assembling next day at the usual time and place, and continuing to meet from day to day until the appointment of the committee was completed

No authority was cited for this position, and I have been unable to find one. The only cases at all bearing upon the point are some in relation to corporations, pointing to a contrary conclusion —(see *Rex* v. *Chetwynd*, 7 B. & C. 695, and *Rex* v. *Langhorn*, 4 A. & E., 538, whence it appears that a defect in summoning even a single member of those entitled to be present could be cured only by all being actually present and consenting to waive the defect) and a statement in a newspaper brought under our notice since the argument, by the parties in this cause, to the effect that the House of Commons was unable to assemble during an adjournment. Newspaper statements, however, are for the most part, too general to be of much value as authorities in matters of law, and cases of corporation practice depend too much upon the terms of the respective charters of these bodies to be often applicable. In the absence, therefore, of all authority, I have to consider this point upon general principles.

When an Assembly is first elected, it cannot of its own accord meet for the despatch of business; it must be called and assembled by lawful authority, the Governor's proclamation, and so after being prorogued, it cannot again meet without the like authority. The same principle, it seems to me, must apply to adjournments. When being lawfully assembled, it adjourns to a future day, the House by a formal resolution declares that it will not meet or transact business until the time named, and discharges all parties from further attendance until then; and when that time arrives it meets and is lawfully assembled by virtue of the order lawfully made at the time of the adjournment.

If the Speaker and any number of members whether three or a quorum, could by voluntarily assembling in the mean time, reconstitute the House for the despatch of business (and if they could do this for one purpose they could for another, no matter how important) they would in effect rescind and overrule the resolution of the House made when lawfully assembled. But by a rule of law familiar to every student, the authority to undo an act must at least be equal to the authority by which it was done—and the Speaker and members would not be of equal authority with the House unless lawfully assembled. Where, then, is the lawful authority to assemble them, outside the Governor's proclamation, during an adjournment? The Speaker has it not, that I am aware of, nor have any number of the members, nor the Speaker and members conjointly. It follows that when voluntarily assembled they have no power in law, political or legislative, and consequently cannot overrule a former resolution of the House. In the commissions and instructions of our several governors, down to those of Sir Alexander Bannerman, there was contained a clause empowering the Governor to adjourn as well as to prorogue and dissolve the legislature. No one will contend that if, in the exercise of this power, the Governor had on any occasion adjourned the Assembly, the Speaker and members could assemble and proceed with business before the time appointed by the Governor for their reassembling, as such a proceeding would be in direct violation of the instrument to which the assembly owed its existence; and in what respect does the legal effect of an adjournment by the House itself differ from an adjournment so made by the Governor? It is not denied that within the law, the Assembly has power to regulate its own proceedings, but no rule of the House has been made to authorize the Speaker to call the House together under the circumstances here supposed. The solitary precedent cited from the Journals of 1852 is not in point, as no private rights were thereby affected, and the meeting of the members before the time fixed for their assembling was in fact but a declaration by the members present of their readiness to vote a sum of money for a benevolent object. The practical operation of such a power as the Speaker here attempted to exercise would be embarrassing and unjust, as the proceedings of the quorum called together at one time, might seriously conflict with the proceedings of another quorum composed of different members assembled at another, the right of absent members would be ignored, and the advantage of a formal adjournment, connecting in time and place each meeting with those preceding and following it, would be altogether lost.

Unless, therefore, I am shown some authority for this position of a character so weighty as to supersede all reasoning upon it, I cannot assent to it; nor can I concur with the Attorney General when he insists that it was incumbent upon the sitting members to have appeared and pleaded before the Committee before applying for this writ. There are, no doubt, many authorities to this effect, but there are also many to the contrary, and in a most recent case upon this point, *The Mayor of London* v. *Cox* (L. R. 2 H.L. Cas. 239) above referred to, all the authorities were reviewed, and it was held that where the Court below has no jurisdiction over the subject matter of the suit, it is not necessary to appear there, and that a party aggrieved may apply to the Superior Court in the first instance. It is not therefore necessary to consider the effect of the protest made by Mr. Whiteway against the committee proceeding.

The last objection taken by the Attorney-General was of greater weight; and were this point not *res judicata*, as after much consideration I think it is, would in my opinion be fatal to this application.

The Attorney General argued that the writ of prohibition could only go to a duly constituted court of recognized powers and authority, which had exceeded or was about to exceed its jurisdiction, and that if the committee was illegally appointed, it was in fact no court, and Messrs. Carter and Evans' only remedy would be by an action at law for any injury they might hereafter sustain by its proceedings. In support of this view the case of *Ex parte Death*, 18 Q. B. 647., may perhaps be cited where a prohibition was refused as against the Vice Chancellor of the University of Cambridge, for alleged illegality in the conduct of an enquiry made by him, with a view to putting in force a statute of the University, but the circumstance that there the inquiry was purely voluntary, distinguishes that case from the present one, which in my opinion falls within the principle of *Chambers* v. *Jennings*, 2 Salk. 553; s. c., 7 Mod. 125: *Carter* v. *Firmin*, 4 Mod. 51, and *Bishop of Chichester* v. *Harward*, 1 T. R. 650; and *In re The Dean of York*, 2 Q. B. 1.

In *Chambers* v. *Jennings*, as reported very briefly in Salkeld, an action for words was brought in a Court of Honor, and a prohibition being moved for, Holt C. J. doubted if there was such a court, but said that the writ should go to a pretended court, and in the same case, as more fully reported in 7 Mod., while the legal existence of the court seems to have been questioned, the prohibition went, not only because an action for words would not lie in a Court of Honor, but because that court was then held before the Marshal only, and not before the Constable and Marshal, as it ought to have been, if held at all—that is to say, a prohibition lay because for one reason the court below was illegally constituted, which is the very ground upon which the present application was based.

This case is referred to as an authority in Bac. Abr., Com. Dig., and *In re The Dean of York*, 2 Q. B. 1.

In *Carter* v. *Firmin*, the court were of opinion that a prohibition ought to issue to an inferior court in the city of London, originally constituted for temporary purpose, which had been satisfied some years before, but the jurisdiction of which an attempt was improperly made to revive.

In the cases of *The Bishop of Chichester* v. *Harward*, and of *The Dean of York*, prohibitions issued to certain ecclesiastical functionaries, to restrain them from the exercise, to the prejudice of third persons, of visitorial powers which they did not legally possess

These cases seem to establish the principle that a prohibition will go to restrain the colorable assumption of judicial authority, such as that which the committee in the present case are about to exercise, and if so, they dispose of the objection I am now considering.

For all these reasons, I am of opinion, that this court has the power which has been ascribed to it, of restraining the committee from further proceedings, that sufficient grounds have been shown for the exercise of that power, and that this rule should therefore be made absolute.

Robinson, J.—In deference to the novelty and importance of the legal questions arising in this case, it seems proper to state the reasons which have influenced my judgment; and before doing so I wish to acknowledge the material assistance I have derived from the arguments and research of the learned counsel engaged in the cause.

To support the plaintiff's right to a writ of prohibition the following propositions must be established: 1st, That an election committee under the statute either was or assumed to be "an inferior Court;" 2nd, That the Supreme Court has authority to examine the constitution of such inferior tribunal, and to confine its action within the limits of law; 3rd, That the Committee now under consideration has not been created in pursuance of the statute, and is therefore inoperative.

It is true that the application for a writ of prohibition to an election committee has not been supported by any direct precedent, but it should not on that account alone be refused; in every series of decisions there must be a beginning, and the first must be determined, as we desire to determine this case, by the application of general principles. It may however be observed, that since the beginning of the present year, the Court of Queen's Bench in England, issued to the Bridgewater Election Committee a mandamus, which is a kindred writ to a prohibition, and did so unhesitatingly, although its authority to interfere with a Parliamentary Committee was questioned by the Attorney General of England.

Reference was made at the bar to some alleged privileges of the House of Assembly of the colony, which the action of this court, in granting a rule *nisi*, was supposed in some way to have invaded; but what those privileges are, or how the House was at all affected by our interference was not shown. As however the matter has been mooted, I think it would be unbecoming to evade an expression of our opinion upon it, and without in the least desiring to abridge the legitimate power of the Legislature, I would observe, that I am not aware of the existence of any privileges or immunities which the law confers upon either branch of our Colonial Legislature beyond those enjoyed by all legally constituted bodies who meet for a lawful purpose, and pursue it in a lawful manner.

Both Houses of the Assembly possess, as incident to their existence, all rights necessary for the due discharge of their legitimate functions, but the judgment of the Judicial Committee of the Privy Council, in a case which arose in Newfoundland thirty-two years ago, *Kielley* v. *Carson*, and has been affirmed by several other decisions in the same High Court of Appeal, has denied and for ever set at rest the pretensions which once were raised by Colonial Legislatures, that, under the assumption that the "Law of Parliament" applied to them, their will was law, and their proceedings were unexaminable by the Superior Courts. It is altogether visionary to imagine that any Legislative Assembly, body or person, possesses under British rule supremacy over the law in any particular whatsoever. Even the prototype of Colonial Legislatures does not claim for itself any such power, for in a recent work of no ordinary ability upon Parliamentary Government in England, I find the following passage: "No mere resolution of either House, or joint resolution of both Houses, will suffice to dispense with the requirements of an Act of Parliament, even although it may relate to something which directly concerns but one Chamber of the Legislature:" Todd's Parliamentary Government, 260.

It is unnecessary to advert to the inherent authority which the House of Assembly might have exercised in conducting its own internal proceedings with relation to its own members alone, and in determining the right of persons to sit within its walls, provided no act of the whole Legislature had limited that authority and prescribed a particular mode of procedure with reference to controverted elections, but as such an act has been passed, it regulates the action of the House, and to its requirements that body, and all persons in the colony, must of necessity conform.

The statute to which I refer was passed in 1860, and is entitled, "An Act to regulate the trial of controverted elections, or return of members to serve in the House of Assembly," 23 Vic. c. 11.

This act was framed upon the model of the Grenville Act, many of the provisions of which it adopted; it prescribes the time within which petitions must be presented, the mode in which recognizances must be perfected, the method by which a Committee of seven members shall be constituted, and the manner in which such tribunal—when duly constituted—shall discharge its functions. It directs that the members thereof shall be sworn "well and truly to try the matters of the petition, and a true judgment give according to the evidence." And it invests the committee with the power to summon witnesses, administer oaths, hear counsel, and "make a final determination upon the matter."

If there had been no precedent upon the subject. I should have held, that such a committee —when created in accordance with the statute— would be, to all intents, a court of justice, and as such would immediately become subject to all the incidents that attach to courts of that description. In May's Parliamentary Guide *passim*, and in *Ransom* v. *Dundas*, 8 Bing. N. C. 123, such a tribunal is expressly recognized as a court.

2ndly. Now one of the characters of all inferior courts, of what nature soever, in England is, that they are subject to the superintending control of the Queen's Superior Courts at Westminster, whose especial duty it is to take care that such inferior courts keep within their bounds—Bac. Abr. 583—and where such courts are proceeding, or assume the right to proceed in a matter, or in a manner in which they either never had any jurisdiction at all, or have exceeded that which they had, prohibition may be awarded: 6 Bac. Abr; *Bierley* v. *Windus*, 7 D. & R. 564.

It is also an indispensable element in the very existence of an inferior court emanating from an act of Parliament, that the essential requirements of such an Act be strictly observed, otherwise, there is no court at all, and every thing done by it is *coram non judice* and a mere nullity —*Bruyeres* v. *Halcomb*, 5 N & M. 149; *Ransom* v. *Dundas*, 8 Bing N. C. 123.

Such being the law in England, the question arises, does the Supreme Court here possess the same powers as the Superior Courts there, and this will be determined by a reference to the Imperial Statute which established this court. The 5 Geo IV. cap. 67, authorized the King to institute a Superior Court of Judicature in Newfoundland, and declared that it should be called "the Supreme Court," and should be "a court of record, and should have all civil and criminal jurisdiction whatever in Newfoundland as fully and amply to all intents and purposes as his Majesty's Courts of King's Bench, Common Pleas, Exchequer and High Court of Chancery in England have, and the Judges of the said Supreme Court should respectively have and exercise the like powers and authorities in Newfoundland, as any judge of any of the said courts, or as the Lord High Chancellor of Great Britain hath or exercises in England."

Pursuant to that Act a Royal Charter instituted this Court with the jurisdiction and obligations aforesaid, and has imposed upon the judges thereof the duty of entertaining and determining the question now before us. Nor is this a novel assumption, for so far back as the year 1720, I find it authoritatively affirmed in 2 Chal. Op. 209, "that the power of granting writs of prohibitions is one which may be, and constantly has been exercised by the Superior Courts in the Colonies."

3rdly. The last point that remains for consideration is—whether the Committee has been brought legally into existence? If it has, we have no power—from anything as yet appears— to interfere with it in the discharge of its functions; if it has not, it possesses no functions to discharge.

A brief examination of the statute will shew what necessary preliminaries are prescribed, and how far an observation of days and times in the procedure of the House to constitute an election committee, is made essential.

The first section directs, that when a petition complaining of an undue election, &c., shall be presented, an order shall be made by the House appointing a *day* and *hour* for the consideration thereof, and at such time the petitioner shall appear under penalty of the order being discharged. The 2nd section limits the time within which recognizances shall be perfected, under penalty of the dismissal of the petition.

The 5th sec. directs, that *on the day* appointed, previously to reading the order of the day for considering the petition, the House shall be called, and if there be less than twenty members present exclusive of the Speaker, the House shall forthwith adjourn to a *particular hour* the *next day*, when they shall proceed in like manner, and so on from *day* to *day* until the requisite number of members shall be present, when the committee shall be drawn, &c.

How far this carefully prescribed order of procedure has been observed is a matter of fact, and will be seen by the evidence laid before the court in the affidavits of the plaintiffs' agents, in the admission of the Attorney General on behalf of the defendants, and in the *viva voce* examination of Mr. Stuart, the Clerk, and of Mr. Hayward, the Solicitor of the House, by which the following details are established—

That the day and hour appointed by the Assembly for taking into consideration the petition of Messrs. LeMesurier and Woods, against the return of Messrs. Carter and Evans, was Thursday, 24th February, at 4.30 o'clock—that there were not on that day twenty members present, and on the fact being ascertained, the House resolved itself into a Committee of Privilege, and directed a "call" for March 3rd, and ordered that the petition be taken into consideration on that day;—that, having doubts about the next step to be taken, the members took counsel together and then adjourned the House to the 3rd March—that the Clerk made an entry at the time in his usual manner, upon memoranda of such adjournment to the 3rd March, and of such order to take the petition into consideration on that day, from which memoranda he is in the habit of transcribing the proceedings into the Journals of the House, but did not do so on that evening, nor send a copy of such proceedings to the Governor, by reason of an engagement, but he stated that if he had not been so engaged, he would have written the Journals conformably with the truth, and would also on that evening have sent a true copy to the Governor—that on the evening of Thursday, or morning of Friday, it was ascertained that the House should on Thursday have adjourned to the "next day," and not for seven days, whereupon recourse was had to the following expedient: the Clerk was ordered to exclude from the Journals the entry of the adjournment on Thursday for a week, and to substitute in lieu thereof an entry declaring the House had adjourned to the following day at 4 o'clock, and had ordered that the election petition should be proceeded with at 4.30 o'clock on that day; he produced in court the Journal containing these fictitious entries, and he frankly admitted that they were untrue, but that he had made them under orders; he also stated that he had transmitted to the Governor a copy of them, purporting to be the actual proceedings of the House.

It did not transpire in court by whom such orders were given, but the fair inference is that they proceeded from some authority which the Clerk was expected to obey, and it did appear that on Friday afternoon at 4 o'clock the Speaker and three other members of the Assembly whose names were mentioned, met in the Assembly Room (the Solicitor said he thought there were five or more) when the erroneous journal was read and approved by those present; and this subsequent ratification was equivalent to an antecedent command and sufficiently identified the authority—that the Speaker and members assuming to be the House, adjourned to the next day, and some members continued to meet and adjourn in the same manner from day to day, until Thursday 3rd March, when the House met—that the members were then called pursuant to the order made on the preceding Thursday, and the requisite number not being present, the House adjourned to the next day, and so on day after day till the 2nd April, when twenty members beside the Speaker being present, the order of the day to take the petition into consideration was proceeded with, and the Election Committee now under consideration was drawn, reduced and sworn—that Messrs. Carter and Evans were notified to attend, but did not do so, and had protested against the proceedings as irregular and void.

It does not appear that the House at any time repudiated the acts of its four members, or corrected the untrue Journal; those, therefore, who tacitly acquiesced in such acts may be considered willing to divide the responsibility incurred thereby, but their acquiescence cannot rectify any error in relation to the adjournment.

I do not believe there was an intention of injuring any one by that adjournment. I think it arose from mere inexperience and in itself involved no dishonor, but for good or for evil it stands a confessed fact and cannot be varied. By no alchymy can a week be transmuted into a day. All the expedients resorted to seem to me only trifling with the matter. It is to the actual condition of things we must apply the law, and the question for our determination remains—What legal effect had that adjournment for a week, instead of for a day, upon the constitution of the Election Committee, subsequently drawn?

The plaintiffs contend that it was a substantial and fatal variance from the statute. The defendants contend, on the contrary, that it was an immaterial mistake, speedily discovered and practically remedied.

The proceedings of the House in relation to the Journals, as detailed in the evidence, are matters upon which—in their moral aspect—I have no need to express my opinion, because they do not affect my decision; but they possess a legal significance to this extent, that they demonstrate the sense entertained by the House itself of the consequences of an adjournment for a week when they have had recourse to measures so extreme to avert them.

In my judgment a strict observance of the days and times prescribed by the Act, was intended to be, and has been made compulsory; it is reasonable that such should be the case; amidst the rivalry of parties, each striving for the mastery and neither knowing whose turn might first come, it was to be expected that the consent of the whole Legislature should be given to denude the representative branch of all discretionary power to postpone the consideration of election petitions, and that an adjournment from day to day until justice should be done, would be rigidly imposed. The language used in the statute to express these intentions is plain; it is the same substantially as was used in the Grenville Act, and so strictly was that Act construed that statutable permission was required to enable the House of Commons to adjourn over Sunday, Christmas Day and Good Friday, when either happened to be "the next day."

The Attorney General, feeling the force of this enactment, submitted that the concurrence at the assembly room of the Speaker and a few members already referred to, was practically a meeting of the House, and a compliance with the law. To that proposition I cannot for one moment assent; it is alike opposed to principle and to practice. An adjournment is a public and solemn act of the whole body, done in its collective capacity. It is one which is jealously guarded and not delegated to any subordinate authority—not even a committee of the whole, although every member might be present, can adjourn the House—and when once adjourned to a certain day there is no power in this Colony, except by the agency of a prorogation, that could legally convene it on an earlier day. A statute was passed in the 39th year of Geo. III. to enable the sovereign, by proclamation, to convene the English House of Commons in an emergency, upon an earlier day than that to which it had adjourned, but no corresponding enactment is in existence here.

That three or four members, voluntarily meeting at a time different from that appointed by the House, and it might be secretly, behind the backs of other members, could—by calling themselves "the House" — override the deliberate action of the whole body previously adopted in open session, is a doctrine that—if tenable—would involve consequences of the gravest, most dangerous character. I do not believe it has the slightest foundation in law, but as it has been openly propounded I will cite a few authorities upon the subject. In Tomlinson's Law Dict. adjournment is defined to be "putting off until another time, and the substance of it is to give license to all concerned to forbear their attendance *till such time*." In a corporation, which is a body possessing functions analogous in some respects to those of a Colonial Assembly created by Royal authority, corporate business can only be transacted at corporate meetings; and in 4 Com. Dig. Tit. *Franchise* (F. 33), a case is reported, wherein a burgess was removed for continuing in Court and attempting to make an order "after the Court had adjourned." (*Yates' Case*, Styles 48.)

In *The Mayor of Carlisle's Case*, 1 Stra. 884, it was determined by the Court of King's Bench in England, that the Mayor and Aldermen must meet in their distinctive capacity to enable them to discharge a duty they were empowered to perform, and although they were all present in another meeting, yet could they not then and there execute their functions; an irregular adjournment of a court of justice is sometimes fatal to a proceeding before it, and it was solemnly decided by the High Court of Parliament in *Lord Delamere's Case*, 36 L. J. Q. B. 313; 17 L. T. N. S. 1, that an unauthorized adjournment, even by that supreme tribunal, would render "all proceedings after such adjournment void."

To one other argument urged by the Attorney General I will briefly advert—he asked, if this Committee be no court at all, why should this Court take any notice of it, and issue a writ to prohibit its action? The answer seems to be that whenever a body of men, with some plausible show of jurisdiction, assume to exercise judicial functions, whereby the rights of the subject are endangered, the Queen, who is the fountain from which alone all justice in the realm flows, will, through her Superior Courts, stay such usurped authority, by granting a prohibition, as Lord Chief Justice Holt did to a "pretended Court" in *Chambers* v. *Sir John Jennings*, 2 Salk. 553.

The defendants contend that whatever may be the strict law, the parties litigant before the House have not sustained any practical damage from the error of the Assembly; although I might perhaps agree with them on that point, there may possibly be a different opinion entertained by the plaintiff, but be that as it may, a court of justice cannot speculate on such points. We are bound by the law and cannot dispense with its provisions. In all such cases a suitor may claim that if he is subject to the penalties, he should also be entitled to the protection of a statute, and I can discover no reason to warrant a denial of such claim. The case of *Freeman* v. *Trainah* 12 C. B. 406, cited at the bar, is in point where, in a case of admitted hardship, the Court would not, because it could not properly, strain the law to afford redress even upon a point of practice.

Lastly—It may be said, why interdict the proceedings of this Committee until it has done some act to the prejudice of the plaintiffs? The answer is that no man is bound to wait to be injured where peril is plainly impending. Moreover, the mere fact of a court that possesses no jurisdiction over a question assuming to exercise judicial functions therein, is of itself a wrong against which the law will protect the party concerned by a prohibition: *Byerley* v. *Windus*, 7 D. & R. 564.

It has been objected that the House did not observe the prescribed mode of procedure on being called over, "previously to reading the order of the day," and that it transacted other business and did not "adjourn forthwith."

Upon the first point there is some conflict of evidence, in which conflict the House is, in my opinion, entitled to the benefit of the doubt, upon the legal maxim, "*omnia presumuntur rite acta*," Upon the second point I am not satisfied, that under our statute, which in this respect differs from the Grenville Act, the House might not legally have transacted some routine business before adjourning.

My conclusions from the whole case are that the adjournment for a week was a substantial violation of the statute—that the meeting of the Speaker and some members on intermediate days was illusory and utterly inefficacious—that the subsequent proceedings of the House to constitute an Election Committee were null and void; that the supposed Committee had therefore no legal existence, and its attempt to exercise jurisdiction was an unlawful assumption of judicial functions to the possible prejudice of the subject which this Court, being moved thereto, is bound *ex debito justitiæ* to prohibit. In reference to this case I say advisedly *ex debito justitiæ*, for whilst it is incumbent upon the Judges of a Supreme Court of Judicature to administer justice and maintain truth to all persons and at all times, it is in an especial manner a sacred duty imposed upon them to interpose the shield of the law between public bodies and private individuals whenever judicial power is illegally claimed by the strong over the weak, and sure I am that if such a tribunal did not exist, and was not ready whenever necessary to exercise its authority with independence, it would be recreant to the trust confided to it; neither person nor property would long be respected, legal rights would be speedily assailed, and civil society would soon lose those characteristics which every one living under British law has a right to expect.

The plaintiffs are entitled to the writ of prohibition, and the rule should be made absolute, but in my opinion without costs, because it would not be just or proper to impose them upon Messrs. LeMesurier and Woods, who were only pursuing their rights, and had done no wrong, nor upon the supposed Committee, who were compulsorily put into action by the House of Assembly, nor upon the House of Assembly, because they are not parties before the Court.

Hayward, J.,—This application for a Writ of Prohibition came before us during the last sitting of this Court.

It was fully argued by counsel on both sides, and evidence was produced in support of the allegations set forth.

The application being a novel one, and many important points and principles involved, we took time for due consideration and investigation, with a view of arriving at a conclusion and delivering a judgment which we believe to be fully borne out by law, under all the authorities bearing on the subject.

After such consideration carefully given, I arrived at the same conclusion as that expressed by my learned brothers of this court, that the committee of the House of Assembly, for the trial of the case between the parties to this proceeding, was not appointed or constituted according to law, and therefore that it is the duty of this court to restrain them from proceeding in the trial of the election petition, by granting a writ of prohibition for that purpose.

I do not, in this judgment, intend to enter fully into the statement of the case submitted by the parties, or the particular points of law bearing upon it, as, since my return from holding the term of the Northern Circuit Court at Harbor Grace, I have had the opportunity and benefit of perusing the decisions of the Chief Justice and Judge Robinson, reduced by them to writing, and I could only repeat in mine, if I enlarged, that which they have so fully and clearly stated and expressed.

Agreeing, therefore, as I do with them in every particular in the law bearing upon this case, I am of opinion that the rule *nisi* should be made absolute.

*Rule absolute, without costs.*

## ENGLISH REPORTS.

### COMMON PLEAS.

### Coates v. The Parkgate Iron Company.

*Practice—Appeal from County Court—Notice of appeal and security—Waiver—13 & 14 Vic. c. 61, ss. 14, 16.*

By 13 & 14 Vic. c. 61, s. 14, a party aggrieved may appeal from a county court to a superior court of common law, "provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security," &c. By the 16th section no judgment of a county court shall be removed by appeal, "save and except in the manner and according to the provisions hereinbefore contained."

*Held* (*dubitante* Keating, J.), that omitting to give the notice and security required by the 14th section was an irregularity which could be waived.

[18 W. R. 928.]

Appeal by the defendants from a decision of the judge of the Rotheram County Court.

*Kemplay*, for the plaintiff, obtained a rule to strike the case out of the special paper of this court, on the ground that the defendants, being the appellants, had given neither the notice of appeal nor the security, required by 13 & 14 Vic. c. 61, s. 14.

By the County Courts Act, 13 & 14 Vic. c. 61, s. 14, a party aggrieved may appeal to a superior court of common law, "provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant and the appeal be dismissed."

By section 15 "such appeal shall be in the form of a case, &c., and such case shall be transmitted by the appellant to the rule department of the master's office of the court in which the appeal is to be brought."

Section 16. "And be it enacted that no judgment, order, or determination, given or made by any judge of a county court, nor any cause or matter brought before him or pending in his court, shall be removed by appeal, motion, writ of error, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned."

*Quain*, Q C., showed cause, and contended that by the conduct of the parties the notice and security had been waived; that as the conditions of notice and security were introduced for the respondent's own benefit, and not for the good of the public, and as no rights of any third party were affected, the omission to comply with those conditions was a mere irregularity which the respondents could waive: *Graham* v. *Ingleby*, 1 Ex. 656; 5 D. & L. 787; Broom's Maxims, 4th ed., p. 670; Quilibet potest renunciare juri pro se introducto; and p. 187: Consensus tollet errorem. It is true that in *Morgan* v. *Edwards*, 5 H. & N., 415, sending up the case and giving notice were held to be conditions precedent to the right to appeal; but the case was distinguishable because it was an appeal from justices under Jervis' Act, 20 & 21 Vic. c. 43, and therefore was in the nature of a criminal proceeding.

*Field*, Q C., and *Kemplay*, in support of the rule, cited also *Furnival* v. *Stringer*, 1 Bing. N. C. 68; *Stone* v. *Dean*, 6 W. R. 602, 1 E. Bl. & E. 504; 27 L. J. Q. B. 319; *Woodhouse* v. *Woods*, 29 L. J. M. C. 149; *Peacock* v. *The Queen*, 4 C. B. N. S. 264; 27 L. J. C. P. 224; 6 W. R. 517.

Bovill, C. J.—On the facts the notice and security were waived, if they could be waived. The question, therefore, is whether on the construction of the Act of Parliament they could be waived. The 14th section confers on a party aggrieved a power of appeal, provided that, within ten days of the decision, he gives to the other party notice of appeal, and that he also gives security. Then the 16th section enacts, that no judgment of a county court judge shall be removed by appeal into any other court "save and except in the manner and according to the provisions hereinbefore mentioned." No doubt that is a prohibitory enactment, but it must be read with the previous provisions of the Act, and I think it may be satisfied by restricting the appeal as respects the special case, which is to be the form of appeal by the 15th section, and as respects the amount. The notice and security under the 14th section are more in the nature of procedure and practice, and are solely for the benefit of the respondent in the appeal, the public not being interested in them. If so the case falls within the general rule that a party may waive what has been provided for his own benefit and protection; and so is within the principle of *Graham* v. *Ingleby* (*loc. cit*). In appeals under Jervis' Act it has been held that when certain provisions have not been complied with the court has no jurisdiction. But some of those cases were strictly of a criminal nature, and in the others the proceedings were in the nature of criminal proceedings. The rule must therefore be discharged.

Keating, J.—I entirely agree that if the objection taken could be waived, it has been waived; but I doubted in the course of the argument, and I still very strongly doubt, how far the Act of Parliament can be read as the Chief Justice has read it, viz., how far the 16th section can be confined to the statement of a case, and the amount. The court can have no jurisdiction to hear this appeal but by the provisions of the act, for the policy of the Legislature is that the county court judge should hear, and finally hear, these cases. No doubt the notice and the security are for the benefit of the litigant party; but at the same time our jurisdiction to hear the appeal entirely depends on the 14th and 15th sections; and then follow the very strong words contained in the 16th section, "that no judgment, &c., shall be removed . . . into any other court whatever, except in the manner"—if it had stopped there, I might have doubted how far the section might not be confined to the form of the case and the amount; but it goes on—"and according to the provisions hereinbefore mentioned." It was argued, and I think with great force, that there "provisions" must include the notice and the security. The rest of the court, however, clearly think otherwise, and therefore I am not disposed to dissent from their judgment.

Smith, J.—If the objection that there was no notice and no security goes to the jurisdiction of the Court, it cannot be waived; but if the condition is entirely for the benefit of the respondent it can be waived. No doubt there was sufficient evidence that it was waived here if it could be waived, and the question is entirely whether it could.

The reasonable construction of the 14th, 15th, and 16th sections is, that the provisions requiring notice to the party and security to the party, are entirely for his benefit, with which no public interest is mixed up, and that according to the ordinary maxim he may renounce them. No doubt the words of the 16th section are strong: "manner" relates to the mode of stating and sending up the case, things in which the court is interested to see that its practice is properly carried out; the other provisions are solely and entirely in the interest of the respondent, and therefore, though the words of the section are negative, they may as regard procedure be read as confined to procedure. At first sight the cases on 20 and 21 Vict. c. 43, seem to have a considerable analogy; but they are distinguishable on the ground that they relate to proceedings in the nature of criminal proceedings, in which a party cannot waive what the law directs. In *Morgan* v. *Edwards*, though the court thought they had no jurisdiction, they threw out a suggestion that in certain cases where the appellant had done all he could to comply with the act he might be entitled to have the appeal go on.

Brett, J.—I think there was a clear waiver in fact. If the notice and security are essential to the jurisdiction of the court to hear the appeal, it is clear they cannot be waived; but if they are a mere mode of procedure, and the enactments are simply in favour of the respondent, and if non-compliance with them would be no detriment to the public, then they can be waived. On the affirmative provisions of the act, I think the conditions of notice and security are entirely in favour of the respondent, and do not go to the jurisdiction but to procedure; but then there is the negative section, and the question is whether that is not expressed in such wide terms as to include the previous provisions. I think that it does not, and that it has no relation to matters of procedure for the benefit of the respondent, and in which the public has no interest.

*Rule discharged.*

## CHANCERY.

### Freeman v. Pope.

*Voluntary Settlement—Intent to delay, hinder, or defraud creditors—Statute 13 Eliz. c. 5—Creditor subsequent to date of settlement.*

In order to set aside a voluntary settlement under the statute 13 Eliz. c. 5, it is not necessary to show that there was in the mind of the settler an actual intent to defraud his creditors. It is enough to show that the necessary result of the execution of the settlement was to prevent the creditors getting payment of their debts.

Where a man, by making a voluntary settlement, renders himself insolvent, a creditor whose debt was contracted after the execution of the settlement has a right to file a bill to set it aside if any debt which existed at the date of the execution of the settlement remains unpaid.

The *dictum* of Lord Westbury in *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 302, that "if the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement," considered as an abstract proposition, went too far. Decision of James, V. C., 18 W. R. 399, affirmed, but on different grounds.

[18 W. R. 906.]

This was an appeal by the defendant, the Rev. George Pope, from a decree of Vice-Chancellor James, setting aside as fraudulent and void as against creditors a voluntary settlement executed by the Rev. John Custance on the 3rd of March, 1868. The hearing of the cause before the Vice Chancellor is reported *ante*, p. 399, but in consequence of the judgment of the Court of Appeal being based on different grounds from that of the Vice-Chancellor, it is necessary to state the facts somewhat more fully than they are stated in the previous report.

By the settlement in question, Mr. Custance assigned to trustees a policy of insurance for

£1,000 upon his own life, in trust for such person or persons as Julia Thrift (afterwards the wife of the defendant, the Rev. George Pope) should appoint. The settlor covenanted to pay the premiums.

One of the trustees was Mrs. Walpole, the housekeeper of Mr. Custance. She was the mother of Julia Thrift.

When he executed the settlement Mr. Custance was the rector of two livings in the county of Norfolk, which produced a net income of £815. He was also possessed of a Government annuity of more than £180 for his life, and he was seized of a copyhold cottage in Norfolk. His only other property was his furniture. When he executed the settlement he owed considerable sums of money to various creditors, and in order to pay them he, on the 3rd of March, 1863, borrowed of Mrs. Walpole the sum of £850, as a security for which he gave her a bill of sale of his furniture. He also, in consideration of £50, covenanted to surrender to her his copyhold cottage. Among other debts which he then owed was one of £489 to his bankers, the Messrs. Gurney, of Norwich. He at the same time made an arrangement with them that he should pay off this debt by half-yearly payments of £50. His tithe agent, a Mr. Copeman, was to receive the tithes, and out of them pay the £50 half-yearly to the bankers. This arrangement was carried out, and when Mr. Custance died on the 21st of April, 1868, there remained due to the bankers only about £50 of their debt, though there was also due to them a further sum in respect of subsequent advances.

In February, 1868, Mr. Custance had borrowed £600 of a Mrs. Howes, giving her as security a bill of sale of his furniture, Mrs. Walpole having consented to postpone her bill of sale to that of Mrs. Howes. When the settlor died he was considerably indebted, but the only debts due at the time of the execution of the settlement which remained unpaid when this suit was instituted were the balance due to the bankers, the debt due to Mrs. Walpole, and a small sum due to a publican.

Shortly after the death of Mr. Custance Mrs. Howes sold the furniture under her bill of sale, and the sale produced about £520, which was not enough to satisfy her debt. There being no other assets, the plaintiff in this suit, who was a creditor for £62 12s. 8d. in respect of groceries supplied to Mr Custance after the date of the settlement, filed the bill to administer his estate, and to set aside the settlement of the policy as fraudulent and void as against the creditors of Mr. Custance under the statute 13 Eliz. c. 5. The bill was filed on behalf of the plaintiff and all other the unsatisfied creditors of the settlor. It should be mentioned that Mr. Custance had executed a settlement of the policy in favour of Julia Thrift in 1858, reserving to himself a power of revocation. This power he exercised in 1861 in order that he might receive a bonus which had been declared on the policy. Mrs. Pope on the 3rd of June, 1868, appointed the sum assured by the policy to her husband.

The Vice-Chancellor expressed his opinion that the settlor when he executed the settlement had no intention of cheating his creditors, but His Honour considered himself bound by the decision of Lord Westbury in *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 293, to set the settlement aside when it was shown that its existence was in fact a hindrance to the payment of the creditors, some of whom were creditors at the time when it was executed.

From this decision Mr. Pope appealed.

*Osborne Morgan*, Q C., and *H. A. Giffard*, for the appellant, contended that after the execution of the settlement the settlor remained perfectly solvent. His debts, besides the debt to Mrs. Walpole, which was secured, were not more than £500, and his means, taking into account the amount of his life income, were ample to pay them. The Vice-Chancellor's decree was really founded upon what was said by Lord Westbury in *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 293, which went further than any previous case. The previous cases showed that it is necessary to prove either a direct intention to defraud the creditors, or circumstances from which such an intention must necessarily be inferred. In *Spirett* v. *Willows* there was such evidence, which did not exist in the present case. They cited *Jenkyn* v. *Vaughan*, 4 W. R. 214, 3 Drew. 425; *Stephens* v. *Olive*, 2 B. C. C. 90: *Richardson* v. *Smallwood*, Jac. 552; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Holmes* v. *Penney*, 3 K. & J. 90, 5 W. R. 132; *Thompson* v. *Webster*, 9 W. R. 641, 7 Jur. N. S. 531; *Adames* v. *Hallett*, L. R. 6 Eq. 468; *Stokoe* v. *Cowan*, 29 Beav. 637, 9 W. R. 801; *Townsend* v. *Westacott*, 2 Beav. 340.

*Kay*, Q C., and *Cosens-Hardy*, for the plaintiff, were not called upon.

*H. Fellows*, for the administrator, a creditor, who was a defendant to the suit.

Lord Hatherley, L. C.—The principle on which the statute proceeds is this, that in all matters persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt was that he conceived that if he were to sit as a juryman and be asked, as he expressed it, as a special juryman this question, whether there was any actual intention on the part of the settlor to defeat, hinder, or delay his creditors, he should come to the conclusion that he had no such intention whatever. He says, "I am satisfied that he had not any idea whatever of defrauding or cheating his creditors by making this settlement in favour of his god-daughter of the policy of assurance which he had made several years before in her favour, when there was no pretence for supposing that he was in embarrassed circumstances" With great deference to the view of the Vice-Chancellor James, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me he does not exactly accurately put the question in supposing that it would ever be left to him as a special juryman to find, *simpliciter*, whether the intention of the settlor was to defeat, hinder, or delay his creditors without a direction from the judge that, if the necessary effect of the instru- was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention. A jury would undoubtedly be so directed lest they should fall into the apprehension that they were to look for any special matter passing in the mind of the settlor (a matter which can never be satisfactorily arrived at by any one), and should pass by the necessary consequences of his act, which consequences can always be estimated from the facts of the case. Of course there may be instances, and several of the cases cited have been such, perhaps *Spirett* v. *Willows* may be considered as an instance of the kind, in which there is direct and positive evidence of an intention to defraud independently of the events which may have occurred, or which at least may be expected to have occurred, from the act which has been done. In the case of *Spirett* v. *Willows*, the man who settled the property, being solvent at the time, but having a considerable debt which would be falling due almost immediately or within a few weeks after his making the voluntary settlement by which he withdrew a large portion of his assets from the payment of debts, collected the rest of his assets, and apparently in the most reckless and profligate manner spent them, and deprived the expectant creditors of the means of being paid. In that case the evidence was clear and plain of the intention to be imputed to him. But case after case has occurred (and this case seems to be one exactly of that character) in which it has been said that if a person unable at the time to meet his debts (I am not saying here it is necessary to go so far, but I am only speaking of the facts of that case as I find them)—If a person unable to pay his debts subtracts from the property which is the proper fund for the payment of those debts that amount of property without which the debts cannot be paid, then as the necessary consequence of his so subtracting that property some creditors must remain unpaid, and those creditors must necessarily be delayed or hindered, and any judge would inform the jury that in that state of circumstances they must infer the intent of the settlor who had so subtracted his property from the result of his act (that property being applicable to the payment of his debts before he professed to give it by way of bounty), and accordingly bring it within the statute of Elizabeth.

Now, what are the circumstances which we find here? They are these. This gentleman was being pressed by his creditors, as appears clearly, on the 3rd of March, 1863. He was a clergyman with a very good income, but a life income only. He had an annuity of somewhat between £180 and £190 a-year, and besides that, he had an income from his benefices; and the two sources together produced about £1,000 a-year; but at the same time his creditors were pressing him, and he had to borrow from Mrs. Walpole, who lived with him as his housekeeper, a sum of £350, wherewith to pay the pressing creditors. That accordingly was done, and he handed over to her the only property he had in the world, beyond his income, and beyond the policy which is now in question—his furniture. It is said, however, that the value of the furniture exceeded, and I will take it to be so, by about £200 the amount of the debt which was secured to Mrs. Walpole. That debt may be put out of consideration now, not only on that account, but because Mrs. Walpole being herself a trustee of the instrument in question, cannot be heard to complain of it. But the other debt he owed was more serious. He owed at the time of this pressure a debt of £339 to his bankers at Norwich, and he required for the purpose of clearing the pressing demands upon him, not only the sum of £350, which he borrowed from Mrs. Walpole, but an additional sum of £150, which sum the bankers agreed to furnish him with, making their debt altogether at the date of the settlement a debt of £489. They arranged with him that they would give him this assistance, and this was most probably in a great measure a friendly act towards a gentleman who was seventy-three years of age, and the duration of whose life, therefore, could not be expected to be very long according to the tables, although, as a matter of fact, he did live five years after that. They were desirous also that their debt should be in some way provided for, and they said, "If you will set apart from your income £100 a-year, and pay us that, we will at present (for it could not be held to be more than a present arrangement) stay any proceedings we might take," for they were, in fact, pressing for the debt. [His Lordship then commented on the details of the arrangement with the bankers, and proceeded—] That arrangement was made but at the same time there was no covenant or bargain on their part that they would not sue at any time they might think fit, while on the other hand they had nothing in the shape of security for the payment of their debt. They had not proceeded against him by taking out sequestration, and there could be nothing in the shape of a charge upon the livings except through the medium of sequestration.

What then was the state of circumstances when he proceeded to dispose of the only other property he had beyond his life income? That other property was this policy for £1,000, payable at his decease, upon which he had a considerable premium to pay—namely £62 per annum. Having assigned that by voluntary gift, for the benefit of his god-daughter, Mrs. Pope, he stood in this position, that he had literally nothing wherewithal to give as security for this debt of £489, which he owed, beyond the surplus value of the furniture, which must be taken to be about £200, and he was clearly and completely insolvent the moment he executed this settlement. He was absolutely insolvent even if you assume (and I asked the question because I was desirous of seeing in what way the matter could be put) that some portion of his tithes and the annuity was then due to him. I see that there was a payment of the tithes made in January, and you could not suppose that there was more than the £200 then owing to him which was paid in May, two months after the deed; and if you even added that to the £200, the value of the furniture, and added something also for the annuity, which likewise was partly payable, the whole put together would not reach the £489. He in truth was at that time insolvent, and there I put it more favourably than I ought to put it, because he could not lay his hands upon that sum, so as thereby to satisfy the debt, if he died at any time between March and May. It is quite one of those cases in which, if in any case there could be any question, it seems that no question could arise, because this gentleman was plainly and distinctly insolvent at the time when the instrument was executed, and being so insolvent, he took away from his creditors the only fund out of which this debt could possibly be paid. That appears to me to be exactly the case in which you must say that the intention is to be assumed from the act.

Then the Vice-Chancellor seems to have felt himself very much pressed by the case of *Spirett* v. *Willows*, and one or two *dicta* of Lord Chancellor Westbury in that case. The first of these *dicta* was certainly put in rather larger terms than was necessary for the decision of the case, and probably in larger terms than the case itself would warrant. The first of these *dicta* is—"If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." This is put in very wide terms, and the Vice-Chancellor seems to have thought himself bound by the words there imputed to the Lord Chancellor, and only upon those words, to hold that in this case the settlement should be set aside. But certainly that expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of this case, in which it is plain that the settlor was not solvent at the date of the execution of the settlement; and still less was it necessary in the case of *Spirett* v. *Willows*, where, being solvent, he was at the same time guilty of a plain and manifest fraud. On the facts there stated, the fraudulent intention was plain and distinct, and therefore required no allegations in general terms, because the mere fact of delaying creditors would be sufficient. Although he might be solvent at the time, the fact of a creditor being delayed might be proved against him. It seems to me, I confess, that the whole misconception in this case has been the necessity of proving an intention where the facts are such as to evidence the necessary result of the acts which have been done. If you were to ask the question about the intention, no doubt, as has been said by the counsel who last addressed us, this gentleman was not thinking about his creditors at all, but was thinking at the moment only about the lady whom he wished to benefit. His whole mind was given to that point, and in thinking of his kindness and generosity towards her, he forgot his creditors; he forgot that they had higher claims upon him, and he provided for her without providing for them. It does not make any real difference that the Messrs. Gurney seem to have been willing at the time to forego the immediate payment of their debt, but the question one would like to ask is this—whether they could not within a month or less after the execution of the settlement, if they had been so minded, have called in their debt, and overturned this settlement? Beyond all possibility of doubt they could have done so, and one has not to look at what was passing in the mind of the settlor, as to whether he was thinking more of one thing than another, which it really is impossible for any human being to fathom. I am willing to say that there was not the slightest immoral intent in the sense of deliberately depriving his creditors of that fund to which they were entitled. On the other hand, the only conclusion that one can come to is this—that he had done an act which in point of fact withdrew from his creditors that fund to which they were entitled, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the Vice-Chancellor is right. The appeal must be dismissed with costs.

Giffard, L.J.—I quite agree with the Vice-Chancellor in thinking that if you take the propositions laid down in *Spirett* v. *Willows* as abstract propositions they go too far, and beyond what the law is. But if you take them in connection with the facts of *Spirett* v. *Willows*, then undoubtedly there is abundance to support the judgment; because in *Spirett* v. *Willows* there was, first of all, a voluntary settlement by a man who at the date of the settlement was solvent, but who immediately after he had made the voluntary settlement realized the rest of his property and denuded himself of everything. Of course, the irresistible conclusion from that was that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett* v. *Willows*. But he seems to have laid it down that there must have been an actual and express intention to defeat creditors when there is a voluntary settlement. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved; that is where, as in *Holmes* v. *Penney*, there is value given for the settlement. and where you have such a case as *Perry-Herrick* v. *Attwood*, 6 W. R. 204, 4 Jur. N. S. 101, where the facts were held sufficient to show that there was an actual and express intention. But when you have a settlement which is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for payment of the settlor's debts, then the law infers intent, and it would be the duty of the judge, in leaving the case to a jury, to tell them that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay his creditors. Now in this case, at the date of the settlement Mr. Custance was really insolvent, and if at the date of the settlement the bankers had insisted on payment and had issued execution they could not have got a present payment unless they had resorted to the policy. That being so, it seems to me that the facts of this case bring the matter entirely within the decided cases, and it is enough to say that at the date of this settlement Mr. Custance was not in a position to make any voluntary settlement whatever. That being so, the appeal must be dismissed, and with costs, for I can see no reason for saying that the decree was not right in giving the whole costs of the suit. There was previously to this case a decision of Vice-Chancellor Kindersley laying down the rule that where a subsequent creditor institutes a suit and proves the existence of a debt antecedent to the settlement, he can maintain a suit such as this; and therefore this is not a new case. There can be no reason for doubting the propriety of that case as decided by the Vice-Chancellor Kindersley either in point of principle or justice.

## IRISH REPORTS.

### Rutledge v. Davies.

*Pleading—Defence confessing part of a plaintiff's demand without bringing amount into court—Practice.*

A defence confessing part and traversing the residue of the plaintiff's demand, in an action for a liquidated sum, is good, although the amount so confessed is not brought into court

*Tudor* v. *Furlong*, 16 W. R. 981, followed.

[18 W. R. 929.]

Motion on behalf of the plaintiff that the defence filed in the cause be set aside.

The declaration contained the ordinary *indebitatus* counts, and the endorsement of particulars claimed £138 6s. 8d. for board, lodging, and other necessaries supplied to the defendant.

The defence was—

The defendant appears and takes defence to the action of the plaintiff, and as to so much of the causes of action in the declaration contained as relate to the sum of £28 6s. 8d, parcel, &c.; the defendant admits the plaintiff's claim, and hereby confesses the plaintiff's cause of action as to the said sum; and as to the residue of the causes of action the defendant says that no board, lodging, &c., &c., was provided by the plaintiff for the defendant as alleged.

*James Murphy*, Q.C. (*Keogh* with him), for the motion.—This plea is embarrassing. A plea confessing part of the plaintiff's demand without bringing the amount so confessed into court was held bad in *Defries* v. *Stewart*, 11 Ir. C. L. App. 18; and Monahan, C.J., says in that case, "we cannot allow this defence, as the result would be to alter the practice of the court, and to render the payment of money into court unnecessary in such cases." In *Dunsandle* v. *Finney*, 10 Ir C. L. 171, an action was brought for £116 16s. rent under a lease; and the defendant, taking "defence to the action," pleaded as to parcel of the sum claimed in the first count of the summons and plaint certain matters in bar concluding, "and, therefore, he defends the action;" and it was held by the Court of Exchequer that the defence was embarrassing as being in form pleaded to the entire cause of action, and not confessing in terms the portion left unanswered. *Tudor* v. *Furlong*, 16 W. R. 981, will be relied on by the defendant. In that case the Court of Queen's Bench decided that a defence confessing part and traversing the residue of the plaintiff's demand was good, although the amount so confessed was not brought into court. *Defries* v. *Stewart*, is, however, a direct authority for this motion, and this court will not be bound by the decision of the Queen's Bench in *Tudor* v. *Furlong*, as it has intimated in some recent cases. If this motion be refused it will have the effect of doing away altogether with the necessity of paying into court.

*Carton*, for the defendant.—The rule is now clearly established by *Tudor* v. *Furlong*, that a plea of confession is the same as a plea of payment into court, and this defence is good.

*Keogh* in reply.

Monahan, C.J.—We are of opinion that this motion must be refused, notwithstanding the case of *Tudor* v. *Furlong*. We think that this motion was rightly brought forward, as a difference of opinion has existed for some time between this court and the Queen's Bench on this important question of pleading. It is true that this court in a very recent case refused to be bound by the decision of *Tudor* v. *Furlong*, but we have now changed our opinion, and in deference to the views entertained by the Queen's Bench, and by the Chief Baron in the case of *Dunsandle* v. *Finney*, in some of the observations which he makes in his judgment, we now hold that this plea is good. A plea confessing part of the action is the same as if the defendant had paid money into court to that portion of the plaintiff's demand, and the plaintiff had marked judgment for that sum. We, therefore, refuse this motion, but without costs.

*Motion refused.*

## DIGEST.

### DIGEST OF ENGLISH LAW REPORTS.

### FOR FEBRUARY, MARCH AND APRIL, 1870.

*(Continued from page 196.)*

Malice.—*See* Slander.

Marriage Settlement.

A., after his marriage to B., settled lands in trust, after their death, for such persons and uses as A. should by will appoint, and in default of appointment "for all and every the . . . children" of A. "But" (after some intervening clauses) "if there should not be any child begotten by A. on B.," then for A. absolutely. B. died, leaving four children. Then A., reciting his intent to give up his interest and forego his power, by a new deed granted to the old trustees his life-estate in trust for his four children, made a voluntary covenant with said trustees that he would not make any will whereby the new trusts might be defeated, and released them from the old trusts. Later, A. married C., by whom he had seven children, and died leaving all his property to C. for life, remainder to her children. *Held*, that A.'s covenant, &c., with the old trustees wholly released A.'s power, and that the children of both marriages took equally under A.'s first settlement, by the clause "for all, &c., the children of A."—*Isaac* v. *Hughes*, L. R. 9 Eq. 191.

*See* Limitations, Statute of, 1; Power, 1, 4; Voluntary Conveyance.

Married Woman.—*See* Husband and Wife.

Merger.—*See* Fishery.

Military Officer.—*See* Libel.

Mortgage.

1. A. agreed to let B. a house, into which B. was to put fittings worth £500, and then, upon payment of £1000, to take a lease for twenty-one years of the premises so fitted up. A. was also to lend B. on "the said premises as fitted up," &c., £1000. B. fitted up the premises, and became bankrupt before the lease was made or money paid. *Held*, that A. was equitable mortgagee of the premises for the £1000, and entitled to the fittings as against B.'s assignee. (Exch. Ch.)—*Tebb* v. *Hodge*, L. R. 5 C. P. 73.

2. A mortgagee is bound to convey and to hand over the title deeds to any person having an interest in the equity of redemption, though only partial, by whom he is paid off. But the conveyance should be expressed to be subject to the rights of redemption of all the persons who hold other interests. When the party redeeming has only contracted to purchase an interest in the premises, the mortgagee need not convey until the party has accepted the title.—*Pearce* v. *Morris*, L. R. 5 Ch. 227; s. c. L. R. 8 Eq. 217.

*See* Fixtures; Power, 1; Redemption Suit.

Name.—*See* Injunction, 1.

Necessaries.—*See* Husband and Wife, 2.

Negligence.

Defendants, in pursuance of a contract, laid down a gas-pipe from the main to a meter in the plaintiff's shop. Gas escaped from a defect in the pipe, and the servant of a third person, a gas-fitter, went into the shop to find out the cause, carrying a lighted candle. The jury found that this was negligence on his part. The escaped gas exploded, and damaged the shop. *Held*, that, irrespective of any question as to the form of action, a verdict in favor of the plaintiff for the damages sustained should not be disturbed because of the negligence of a stranger both to him and to the defendant.—*Burrows* v. *March Gas & Coke Co.*, L. R. 5 Ex. 67.

*See* Carrier; Public Exhibition; Railway; Solicitor.

New Assignment.—*See* Pleading, 1.

Next Friend.—*See* Husband and Wife, 4.

Notice.

If the purchaser under a contract for the sale of land knows it to be occupied by a tenant, he is affected with notice, as against the vendor, in case the tenant has a lease, although he did not know it in fact; and he cannot maintain a bill for specific performance with compensation against the vendor.—*James* v. *Lichfield*, L. R. 9 Eq. 51.

*See* Bills and Notes, 3; Company, 5.

Novation.

1. Company X. granted an annuity charged on its assets to A. Afterwards X. transferred its assets and liabilities to Z.; and A., knowing that X. and Z. "were one," received some payments from Z., and gave some receipts to it. His certificates of identity referred to him as described in a grant from X., and said grant was never exchanged for one from Z. *Held*, that, as a conclusion of fact, A. had not accepted Z. as his debtor in place of X.—*In re Family Endowment Society*, L. R. 5 Ch. 118; *In re National Provincial Life Assurance Co.*, L. R. 9 Eq. 306.

2. A., the holder of a policy of life insurance issued by Company X., after he knew that X. had transferred its assets and liabilities to Z., and had ceased to carry on business, paid the premiums on his policy to Z. for thirteen years, and on the dropping of the life sent in a claim to Z. *Held*, that A. had released X., and had accepted Z. as his debtor instead.—*In re National Provincial Life Assurance Co.*, L. R. 9 Eq. 306.

3. A., the holder of a policy of life insurance issued by Company X., received notice that X. had been dissolved, and had transferred its liabilities and assets to Z., and that he was entitled to have his "policy exchanged for a new one, or an indorsement made thereon, on the part of Z., guaranteeing its due fulfilment." A. thereupon sent his policy to Z., and Z. indorsed it, charging the property of Z. with liability under it, provided future premiums were paid to Z. A. paid one premium, and on the dropping of the life sent in his claim to Z. *Held*, that A. had released X., and accepted Z. as his debtor instead.—*In re International Life Assurance Society & Hercules Insurance Co.* L. R. 9 Eq. 316.

Parish.—*See* Way.

Parties.

Vendors of land filed a bill for specific performance or rescission of the agreement, and made a sub-purchaser of a part of the land a defendant. The sub-purchaser now brings a bill for specific performance against his vendor, and makes the original vendors defendants, who demur. *Held*, that as they had made the plaintiff a defendant to their bill, he was right in joining them.—*Fenwick* v. *Bulman*, L. R. 9 Eq. 165.

**Patent.**

1. The object of a patent was described as "being to produce a glazed lamp, the flame of which shall throw little or no shadow, and yet possess the requisite strength, and also facilities for lighting and cleaning;" and protection was claimed for the arrangement and combination of parts as described. One feature in the lamp was a sliding spherical door. *Held*, that as this would not have been patentable singly, it was not protected as part of the combination.—*Parkes* v. *Stevens*, L. R. 5 Ch. 36; s. c. L. R. 8 Eq. 358.

2. E. had an English patent for a machine for making cast tin-foil, with the right to "the whole profit, benefit, commodity and advantage" of his invention. B. made tin-foil by the same process abroad, and consigned it to England, where it was sold. *Held*, an infringement.—*Elmslie* v. *Boursier*, L. R. 9 Eq. 217. See *Wright* v. *Hitchcock*, L. R. 5 Ex. 57.

3. A. took out a patent for "improvements in the manufacture of frills or ruffles, and in the machinery or apparatus employed therein." The specifications described a process of making frills, ruffles, or "trimmings" (the last word was not in the provisional specification), by means of a reciprocating knife, in combination with a sewing-machine. The claims were: "1. The construction, &c., of machinery, &c., for producing crimped, &c., frills, &c., in a sewing-machine. 2. The application, &c , of a reciprocating knife for crimping fabrics in a sewing-machine. 3. The peculiar manufacture of crimped, &c , frills, or trimmings, as hereinbefore described," &c. B. took out a letter patent which substantially imitated A.'s reciprocating knife, without the sewing machine. C. bought and sold, in the way of trade, articles manufactured by B.'s process, described as "B.'s patent machine-made plaiting" The jury found a verdict for A. against C. on the issues of novelty and of infringement. *Held*, that the verdict should not be disturbed There was evidence of infringement by C. A.'s patent was for the process, and not limited to manufacture by the knife in combination with the sewing-machine, and it was not invalidated by the insertion of the word "trimming," hence B.'s process was an infringement.—*Wright* v. *Hitchcock*, L. R. 5 Ex. 37.

**Payment.**—*See* Company, 5; Interest.

**Piracy.**—*See* Copyright, 1.

**Pleading.**

1. Trespass for breaking and entering a certain close described by abuttals, and breaking certain gates. Pleas, a public footpath, and that defendant was using the same, and pulled down the gates because they were across the path, and obstructed it. Replication, denying the whole plea. At the trial the plaintiff admitted the footpath, but offered to prove that the trespasses were committed elsewhere, and that there were no gates across the footpath, but that there were gates pulled down by the defendant where the trespasses were committed. *Held* (Willes, J., *dubitante*), that, the plaintiff not having new-assigned, the evidence tendered by him was inadmissible. (Exch. Ch.)—*Huddart* v. *Rigby*, L. R. 5 Q. B. 139.

2. To a plea bad for want of a material allegation, the plaintiff demurred, and also replied (under the Common Law Procedure Act), denying the material fact not alleged in the plea. After judgment for the plaintiff on the demurrer, verdict was for the defendant on the replication. *Held*, that the defendant was entitled to judgment and the *postea*. The denial in the replication, with the contrary finding of the jury, supplied what was wanting in the plea.—*Digman* v. *Bailey*, L. R. 5 Q. B. 53.

*See* Indictment.

**Pledge.**—*See* Security.

**Power.**

1. A. settled freeholds, the legal estate in which was outstanding, upon trust to pay the "rents, issues and profits to A.'s wife, B., for life, then to A. for life, and after the death of A. and B., to C., the trustee, to renew leases for lives, and take fines on renewals, but so as not less than the usual rents should be reserved. It was expressly provided that C. should hold any fine to be taken by him in trust for the child who, &c. A. afterwards mortgaged his interest under the settlement to B., and, later, became bankrupt. *Held*, that A. was entitled to the fines on renewals for his own benefit, and that, as the legal estate was outstanding, he could come into equity for a declaration of his right to the fines as against B. and C., who claimed them; also that A. could still grant renewed leases with the concurrence of the mortgagee and assignee.—*Simpson* v. *Bathurst*, L. R. 5 Ch. 193.

2. The donee of a power to appoint to children exclusively, appointed to trustees to pay the income during the life of child A. to A. or his children in their discretion, and then to such of A.'s children as A. should appoint, and in default to child B. "And I appoint, &c., all my, &c., estate not hereinbefore appointed, &c., to B." *Held*, that the first

appointment being bad, the last clause executed the power in favor of B., and that there was no case of election.—*Wallinger* v. *Wallinger*, L. R. 9 Eq. 301.

3. A share of a residue was left in trust to pay the income to C. for life, and then the trust for M. provided that the trustees might, if they thought it desirable, purchase with such share an irredeemable annuity for the life of C. and for his benefit. No annuity was purchased, but the acting trustee, from time to time, paid C. three-fourths of the capital of the share. *Held*, that the power was well exercised *pro tanto*, and that M. was only entitled to what was left.—*Messeena* v. *Carr*, L. R. 9 Eq. 260.

4. A., having a power of appointment in favor of children, who were entitled equally in default of appointment, after the appointment to his first daughter, discussed in s. c. L. R. 8 Eq. 312; 4 Am. Law Rev., 477, but now discussed on appeal, appointed one-fourth of the fund to his second daughter B., on her marriage, she being still an infant. But B.'s fund, like the one settled on the first daughter, was to go to A., in default of issue of the marriage. A. also gave bond for a like sum, to be held on like trusts, on which considerable sums had been paid. *Held*, that the reservation to A. of an ultimate interest in the fund appointed was not, on its face, a corrupt bargain to induce A. to appoint, but an exclusion of the rights of B.'s husband, and was not a fraud upon the power.—*Cooper* v. *Cooper*, L. R. 5 Ch. 203.

5. A. settled funds in trust for his daughters, B. and C., or one of them, as his son D. should appoint, and in default of appointment, the dividends to be paid B. and C. in equal shares during their joint lives, &c. A. died, C. married, and D. appointed the income of the fund to B. for life, reserving a power of revocation, and not informing B. of the appointment. D., in this, was carrying out A.'s orally expressed intention in the event of C.'s marriage, of which he disapproved. One-half the income was applied by B. to her own use; one-half was accumulated, and held in suspense. This appointment having been held void as a fraud on the power, D. appointed the income to B. during the joint lives of B. and C. absolutely, and B. was formally notified. There was no agreement between B. and D. as to the disposition of the income. *Held*, that, as it appeared to the court that D. had not a real intent that B. should deal with the whole fund as her own, but that B. was a mere instrument to effect D.'s purposes, the second appointment was void.—*Topham* v. *Duke of Portland*, L. R. 5 Ch. 40.

*See* Husband and Wife, 4; Limitations, Statute of, 3; Marriage Settlement; Voluntary Conveyance; Will, 10.

**Practice.**—*See* Costs, 3–5; Pleading, 2; Privileged Communication.

**Prerogative.**—*See* Fishery.

**Presumption.**—*See* Death.

**Principal and Agent.** — *See* Husband and Wife, 2.

**Principal and Surety.**—*See* Action.

**Privileged Communication.**

Plaintiffs having claimed damages for injuries alleged to have been sustained by them on the defendants' line, defendants sent their medical officer before suit brought or expressly threatened, to report to them as to said injuries, that they might determine whether or not to yield to the claim. *Held*, that the report was privileged from inspection by the plaintiffs.—*Cossey* v. *London, Brighton & S. C. Railway*, L. R. 5 C. P. 146.

*See* Libel.

**Privity.**—*See* Action; Parties.

**Production of Documents.**—*See* Inspection of Documents; Privileged Communication; Vendor and Purchaser of Real Estate.

**Property.**—*See* Copyright, 1; Injunction, 1; Security.

**Proximate Cause.** — *See* Negligence; Railway, 3.

**Public Exhibition.**

A., on behalf of himself and certain others, made a contract by which a builder was to erect and to let to them a grand stand for the Cheltenham races. Afterwards A., on behalf of the same parties, admitted persons to the stand, and among them the plaintiff, receiving 5*s.* each, which went to the race fund. A. employed a competent builder, and did not know that the stand was negligently built; but it was so, and in consequence fell, and injured the plaintiff. *Held*, that A. was liable. As in the case of carriers of passengers, there was an implied understanding that due care had been used, not only by him, but by independent contractors employed by him to construct the stand.—*Francis* v. *Cockrell*, L. R. 5 Q. B. 184.

**Public Policy.**—*See* Restraint of Trade.

**Railway.**

1. A railway company was held (mainly on the authority of previous cases) liable for an injury received by a passenger in its train, but on the line of another company, solely through

the negligence of the latter, which wholly controlled the traffic arrangements.—*Thomas* v. *Rhymney Railway Co.*, L. R. 5 Q. B. 226.

2. A railway company is not liable to the owner for the loss of luggage which is delivered to the company, with the owner's knowledge, as part of the ordinary luggage of another person, a passenger.—*Becher* v. *Great Eastern Railway Co.*, L. R. 5 Q. B. 241.

3. Hedge trimmings, &c., were left in heaps near defendants' railway by their servants for fourteen days in very hot weather. A fire broke out in the heaps just after two trains had passed, and was carried by a high wind along an adjoining hedge, over a stubble field and a public road, to plaintiff's cottage, two hundred yards from the line, and burned the same. There was no evidence that the engines were improperly constructed or driven. *Held* (Brett, J., *dissentiente*), that there was evidence to go to the jury of negligence on the part of the defendants.—*Smith* v. *London & S. W. Railway Co.*, L. R. 5 C. P. 98.

*See* Company, 4; Privileged Communication.

Redemption Suit.

A suit for redemption, in which the right to redeem is denied, is a redemption suit.—*Powell* v. *Roberts*, L. R. 9 Eq. 169.

Release.—*See* Marriage Settlement.

Remedy and Right.—*See* Statute.

Restraint of Trade.

A manufacture carried on partly under patents, and partly by secret processes, was sold, and the vendors covenanted not to carry on the same, nor to allow it to be carried on in any part of Europe, nor to communicate the process "so as in any way to interfere with the exclusive enjoyment by [the purchasers] of the benefits hereby agreed to be purchased." *Held*, that this covenant could be enforced by injunction.—*Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345.

*See* Embezzlement.

Revocation.—*See* Voluntary Conveyance.

Revocation of Will.—*See* Will, 3.

Security.

1. A., an army agent, to secure balances from time to time due to him from B., an officer, took out in his own name and paid for policies on B.'s life, but charged B. in his books with the premiums paid, &c. A. drew on B. for round sums, more than the balance due from B., including the premiums, and B. accepted the bills (the Chancellor thought merely as a means to raise money), but they were afterwards dishonored. No account had been sent to B. charging him with the premiums, nor did it appear that he knew he was so charged. *Held*, reversing the decree below, that A. was entitled to the whole proceeds of the policies, without accounting to B.'s representatives.—*Bruce* v. *Garden*, L. R. 5 Ch. 32; s. c. L. R. 8 Eq. 430. 4 Am. Law Rev. 465.

2. An annuity was granted which, besides interest on the purchase-money, was large enough to pay premiums on a policy taken by the annuitant on the life of the grantor. The grantor was bound to aid in effectuating the policy, but the annuitant could have kept the money instead of obtaining the insurance, had he so desired. The grantor afterwards repurchased the annuity, as he had a right to do by the terms of sale, and demanded an assignment of the policy in the hands of the annuitant, which Stuart, V. C., refused on the authority of *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440, against his own opinion.—*Knox* v. *Turner*, L. R. 9 Eq. 155.

Separate Property.—*See* Husband and Wife, 3, 4.

Separation Deed.—*See* Desertion.

Settlement.—*See* Fraudulent Conveyance; Limitations, Statute of, 1; Marriage Settlement; Power, 1, 4; Voluntary Conveyance.

Sheriff.

A certificate of the filing and registration of a deed under sec. 192 of the Bankruptcy Act of 1861, is, by sec. 198, available to the debtor for all purposes as a protection in bankruptcy, but it was *held*, nevertheless, that the sheriff was not liable in trespass for arresting or detaining a debtor after production of such a certificate. This case contains some interesting discussion outside the words of the act.—*Ames* v. *Waterlow*, L. R. 5 C. P. 53.

Shifting Use.—*See* Forfeiture.

Ship.

By Stat. 24 Vic. cap. 10, sec. 18, "whenever any . . . vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have" certain powers. In a case where proceedings *in rem* had been instituted in said court against a vessel, and bail had been given for it, but the vessel had never been under actual arrest: *Held*, that the court had said powers.—*The Northumbria*, L. R. 3 Adm. & Ecc. 24.

*See* General Average; Insurance.

Slander.

A.'s widow gave B., as security, a bill of sale of certain of A.'s goods, without having taken out administration. C. took out administration, and told the defendant, B.'s agent, that the bill of sale was invalid, as A.'s widow had no title. Afterwards, when C. was about to sell the same goods at auction, the defendant notified those present that he held a bill of sale in favor of B., and forbade the sale. In an action by C. for slander of title: *Held*, that there was no evidence of malice to go to the jury, and that the plaintiff was properly nonsuited.—*Steward* v. *Young*, L. R. 5 C. P. 122.

*See* Libel.

Solicitor.

The plaintiff invested money on security, the value of which depended, as he knew, on building operations. In this he followed his solicitor's advice, which was founded on the opinions of competent surveyors. These opinions also were submitted to the plaintiff. A bill against the solicitor charging improper motives was dismissed with costs.

*Semble*, that equity can give relief when a client has sustained loss by the gross negligence of a solicitor.—*Chapman* v. *Chapman*, L. R. 9 Eq. 276.

*See* Limitations, Statute of, 2; Statute.

Specific Performance.—*See* Notice; Parties.

Statute.

By 6 & 7 Vic. cap. 73, sec. 26, no person who, as solicitor, shall carry on any proceedings in certain courts, "without having previously obtained a stamped certificate which shall then be in force, shall be capable of maintaining any action or suit at law or in equity, for the recovery of any fee," &c. A client took out an order of course for taxation, by which he submitted to pay what should be found due. The taxing master disallowed items for business done when the solicitor's certificate had not been renewed. *Held*, that they should have been allowed. The act did not extinguish the debt, but only the remedy. —*In re Jones*, L. R. 9 Eq. 63.

*See* Bankruptcy; Fraudulent Conveyance; Infant; Sheriff; Trust; Will, 3.

Statute of Limitations. — *See* Limitations, Statute of.

Subrogation.—*See* Insurance, 4.

Succession Duty.—*See* Legacy Duty.

Surety —*See* Action.

Surveyor.

It seems that a practice of paying surveyors by commission on the amount of the purchase money ought not to be disturbed.—*Attorney-General* v. *Drapers' Company*, L. R. 9 Eq. 69.

Tenancy in Common.—*See* Injunction, 2.

Tender.—*See* Interest.

Title.—*See* Security; Slander.

Tort.—*See* Injunction, 2.

Trade Mark.—*See* Injunction, 1.

Trade Secret.—*See* Restraint of Trade.

Trespass.—*See* Pleading, 1; Sheriff.

Trover.—*See* Carrier.

Trust.

A., a vendor, covenanted in the usual way to surrender copyholds to B., the purchaser, but without words declaring a trust for B. until surrender, and the purchase money was paid. A. died before surrender, and his customary heir was of unsound mind. *Held*, that, as the contract was executed, a suit was not necessary to declare the heir a trustee, and that a person might be appointed without it, under the Trustee Act, 1850, to convey to B.—*In re Cuming*, L. R. 5 Ch. 72.

*See* Husband and Wife, 5; Limitations, Statute of; Security; Voluntary Conveyance.

Ultra Vires.—*See* Company, 5.

Valued Policy.—*See* Insurance, 4.

Vendor and Purchaser of Real Estate.

Upon a sale of leasehold property without any condition protecting the vendor against the production of deeds, the vendor is bound to produce a lease recited in one of the deeds contained in the abstract as the root of his title, although the lease is more than sixty years old. (Exch. Ch.) — *Frend* v. *Buckley*, L. R. 5 Q. B. 213.

*See* Damages, 3; Fixtures; Interest; Mortgage, 1; Parties.

Voluntary Conveyance.

A., a woman, settled her property at the time of her marriage, after other trusts, on the children of any future marriage, and if she had no children, then on her nephews and nieces, without any power of revocation being reserved. A. was not accustomed to business, and it was not explained to her that the above trusts were irrevocable. Furthermore, the settlement gave no powers of leasing or otherwise controlling the property to A. A. now seeks to set aside the deed, the above trusts being the only ones subsisting. A long time had elapsed since A. knew the terms of the deed, but the situation of the parties interested had not changed. *Held*, that as the above trusts were voluntary, and did not appear to have been intended to be irrevocable, they could be set aside, and in this case lapse of time made no difference. — *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

*See* Fraudulent Conveyance.

Waiver.—*See* Consideration.

Warehouseman.—*See* Carrier.

Warranty.—*See* Public Exhibition.

Way.

*Semble*, an action can be maintained for an injury arising from the non-repair of a highway by a parish, only where the right has been exceptionally given by the legislature to persons sustaining an injury in a particular district.—*Gibson* v. *Mayor of Preston*, L. R. 5 Q. B. 218.

Will.

1. The testator requested one person to attend and witness his will, and another to witness a paper. They both attended at the time and place appointed, when the testator produced a paper so folded that no writing on it was visible, and informed them that in consequence of his wife's death it was necessary to make a change in his affairs, and he asked them to sign their names to it, which they did. The testator did not sign in their presence, nor did they see his signature. The paper had an attestation clause upon it, in the handwriting of the testator, not quite in the ordinary terms, but showing knowledge of what forms were required in executing a will. *Held*, that the will was properly executed.—*Beckett* v. *Howe*, L. R. 2 P. & D. 1.

2. G. made a will, and with it a paper of directions to executors to form a part of it. By a later will, revoking all former wills and codicils, his executors were to dispose of all the chattels in the rooms occupied by G. at the time of his decease, "according to the written directions left by me, and affixed to this my will." There were no such directions affixed; but the above paper was found in G.'s private room. *Held*, that it could not be included in the probate.—*Goods of Gill*, L. R. 2 P. & D. 6.

3. At the foot of his will, the deceased duly executed in the presence of two witnesses a memorandum that "this will was cancelled this day," &c. *Held*, that this was not a will or codicil, but only a "writing" (1 Vic. c. 26, s. 20), which could not be admitted to probate.—*Goods of Fraser*, L. R. 2 P. & D 40.

4. "Being obliged to leave England to join my regiment in China, . . . . I leave this paper containing my wishes. . . . Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," &c. The deceased returned from China to England. *Held*, that the above will was conditional on the party's death in China.—*Goods of Porter*, L. R. 2 P. & D. 22.

5. "I appoint my nephew, J. G., executor." There were living at the date of the will a son of the testator's brother, and a nephew of the testator's wife, both named J. G. He hardly knew of the former, while the latter lived with him, managed his business, and was always spoken of by him as his nephew. *Held*, that, as the word "nephew" in a popular sense applied to the latter, the above facts could be considered in interpreting it.—*Grant* v. *Grant*, L. R. 2 P. & D. 8.

6. A testator left all his property to two persons, whom he appointed executors (one being a neighboring farmer, the other a surgeon, called in during his last illness to make the will), "in and for the consideration of" paying over the rents and profits to his wife for life: *Held*, that the executors did not take beneficially, but that the estate, subject to the widow's life-interest, was undisposed of.—*Bird* v. *Harris*, L. R. 9 Eq. 204.

7. A woman, after a Scotch divorce, invalid in England, and before the death of her husband, made a will purporting to dispose of her separate property. Her estate was about £800, consisting in part of savings from an annuity settled on her, her executors, &c., for life, by her husband after marriage, and in part of a legacy paid to her after the divorce. Her husband died, but she did not republish the will. Probate was granted, limited to the separate estate of the deceased; the applicant to file an affidavit, stating of what, in his belief, it consisted.—*Goods of Crofts*, L. R. 2 P. & D. 18.

8. A. devised his lands in trust for W., the eldest son of A.'s brother, B., in tail; then for the first and other sons of A.'s brother, C., in tail; then for the first and other sons of A.'s brother D. in tail; then for the second and other sons of B. in tail. He empowered his trustees to grant leases "during the minority of any infant tenants in tail," "or other persons for the time being entitled," and to manage the estates, &c., during the minority of any tenant for life, in tail, or in fee, "entitled to the present possession." A. also left a residuary fund to his nephews and nieces living at his decease, except W., "or others the person or persons entitled" to the lands. W. died before A., an infant, and unmarried. B. died unmarried after A. The second son of B. was now of age, and tenant in tail expectant on the death, without sons, of C., who was sixty-eight, and unmarried. There were other nephews and nieces of A. *Held*, that B.'s son was not so "entitled" to the lands

that he could not share in the funds.—*Umbers* v. *Jaggard*, L. R. 9 Eq. 200.

9. Testatrix gave a share of residuary personal estate to such of her four grand-children, A., B., C. and D., as should be living at the death of E. But if any of the said four grandchildren should die in the lifetime of E., leaving issue, "the share or shares of such of them so dying shall be assigned and transferred to such issue respectively, in equal shares and proportions, on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the mean time to be applied in or towards their maintenance and education. C. died in the lifetime of E., leaving issue, of whom several died under twenty-one. *Held*, that C.'s share vested in such of C.'s issue only as attained twenty-one.—*In re Ashmore's Trusts*, L. R. 9 Eq 99.

10. A. gave a residuary estate to be equally divided amongst his children. He afterwards gave the dividends for the use of each of his children during their respective lives, and, if they had children, then the principal to be at the disposal of the parent of such children. If any of A.'s children should leave no children, his share to revert into the residuum.

A.'s daughter B., by her will, expressed her intention of appointing her share under A.'s will to her children, but gave them a part only, and after directing debts and legacies to be paid, gave to her son the residue of the personal estate which belonged to her, or which she had any general power to dispose of. *Held*, that B. took a life-estate under A.'s will, with a power of appointment among her children; that B. had not fully exercised the power; and that the part not expressly appointed was divisible among B.'s surviving children.—*Butler* v. *Gray*, L. R. 5 Ch. 26.

11. A testator left his residuary personal estate in trust for his wife during her life, and at her death for his children "or their heirs." One of the children died before the wife, having assigned his share. *Held*, that the next of kin of the deceased child took, and not the assignee.—*Finlason* v. *Tatlock*, L. R. 9 Eq. 258.

12. A testator left a residue to trustees, to collect, &c., and then to divide the whole among his four children, A., B., C. and D., "with benefit of survivorship in case any of them should die without issue," and if any of them should die leaving children, "the share, whether original or accruing, of him . . . so dying, shall go, belong, and be divided between such children," &c. A., B., C. and D. all survived the testator. *Held* (reversing the decision of Malins, V. C.), that they did not thereby acquire indefeasible interests.—*Bowers* v. *Bowers*, L. R. 5 Ch. 244; s. c. L. R. 8 Eq. 283. *See* 4 Am. Law Rev., 484.

*See* Covenant; Limitations, Statute of, 2, 3; Power, 2, 3.

Winding up.

1. The *Warrant Finance Co.'s Case*, L. R. 4 Ch. 643; 4 Am. Law Rev., 288, was not merely a rule for the future, but a declaration of the law as it then stood.—*Ebbw Vale Co.'s Case*, L. R. 5 Ch. 112.

2. But the rule in that case does not prevent a creditor who holds a security (although on the estate against which the proof is made) from receiving dividends to the full amount of the principal, and at the same time realizing his security until the full amount of principal and interest has been satisfied. — *Warrant Finance Co.'s Case* (*No.* 2), L. R. 5 Ch. 88.

3. Nor from receiving dividends for the same debts from the estates of two companies in liquidation until the full amount of debt and interest has been satisfied.—*Warrant Finance Co.'s Case*, L. R. 5 Ch. 86.

4. Upon a petition to wind up a canal company, presented by the company, the corporation of a town within which part of the canal was situated, and a canal company whose canal communicated with that of the petitioning company, were heard in opposition to the petition.—*In re Bradford Navigation Co.*, L. R. 9 Eq. 80.

*See* Company, 1; Damages, 1.

Witness.—*See* Will, 1.

Words.

"*Abandon and expose.*"—See Infant.
"*All debtors.*"—See Bankruptcy, 1.
"*All not hereinbefore appointed.*"—See Power, 2.
"*Arrest.*"—See Ship.
"*At and from.*"—See Insurance, 2.
"*Children or their heirs.*"—See Will, 11.
"*Codicil.*"—See Will, 3.
"*Entitled.*"—See Will, 8.
"*In consideration of.*"—See Will, 6.
"*In good safety.*"—See Insurance, 3.
"*Nephew.*"—See Will, 5.
"*Rents, issues and profits.*"—See Power, 1.
"*Suit for redemption.*" — See Redemption Suit.
"*Trimming.*"—See Patent, 3.
"*Will.*"—See Will, 3.
"*With benefit of survivorship.*"—See Will, 12.

## GENERAL CORRESPONDENCE.

To The Editors of the Law Journal.

Gentlemen,—A man bequeathes his personal property to his daughters, leaving his real estate to an only son, making a proviso that the son shall maintain his mother during life, or as long as she remains the widow of the testator. Please state in the next number of the *Journal* if she will be obliged to comply with the conditions of the will, or will she have power to set aside the will and claim one-third of the real estate. Also, if a work entitled the "Canadian Domestic Lawyer" is recognised by the profession as good authority.

Hoping that you will favor with an early reply, I remain your obedient servant,

Inquirer.

Sheffield, Sept. 7th, 1870.

[The question of law put by our correspondent is not one that comes within our rule to answer. He must consult a lawyer. We are not acquainted with the book referred to, and therefore can give no opinion upon it. The profession have, however, in a measure, a kindly feeling to the authors of "law made easy" books, as their tendency is in a general way (not from any mistakes that may be in them, but from the "penny wise and pound foolish" economy of those who trust them alone) to put money in the lawyers' pockets.

Eds. L. J.]

## REVIEWS.

*The Canadian Illustrated News.* George E. Desbarats: Montreal.

This illustrated weekly makes its regular and welcome appearance. We are glad to see the marked improvement in its illustrations, and to hear that the enterprising publisher is encouraged by the patronage he has received to increase his exertions to make it a first-class periodical. The difficulties in starting, and when started, in keeping up an illustrated paper, especially when its circulation must of necessity be somewhat limited, are great, but success, we trust, will be the result. As a Canadian paper we wish it success, which its intrinsic value, especially in the reading matter it contains, fully merits.

*Every Saturday.* New York: Sept. 10. A handsome illustrated paper, containing various European war pictures. It has besides a fine portrait of Mademoiselle Sessi, and some well executed summer pictures. Its literary contents comprise some interesting editorials on The Balance of Power, An Empire's Bull Run, &c. It has two additional chapters of "The Mystery of Edwin Drood," and other readable articles.

## OBITUARY.

### John Roaf, Esq.

The subject of our notice was born at Wolverhampton, England, on the 12th of January, 1827, and resided in that place until 1837, when with his father, the late Rev. John Roaf, he came to Toronto, where he resided until his death, which took place on the 29th of August last.

Mr. Roaf was educated at Upper Canada College, and the University of Toronto. After taking his degree, he commenced the study of the law in the office of the late Judge Sullivan, and entered his name on the books of the Law Society on the 16th of June, 1846. In February, 1849, he was admitted as an attorney and solicitor, and was called to the Bar in Easter Term of the same year.

His ability and attention to business soon brought him a large practice, which he conducted with much success, almost entirely devoting himself to Chancery. His office business was successively in connection with Mr. J. Harvey Price, Mr. Oliver Mowat the present Vice-Chancellor, and subsequently with Mr. Downey and Messrs. English & Foster.

On the 22nd of December, 1864, he was appointed one of Her Majesty's Counsel, and in Michaelmas Term, 1866, he was appointed a Bencher. He was an able and industrious lawyer with sound judgment, with first rate standing at the Equity Bar, and it is more than likely, if his health had not declined, that he would some time since have been placed on the Chancery Bench.

In 1849, he married the youngest daughter of the Rev. James Richardson, by whom he had three children.

At the request of the Treasurer and Benchers of the Law Society, the Bar attended his funeral in their robes, which was not merely a mark of respect to a member of the Bench, but an evidence of the esteem and kind feeling of those who knew him.

## DIARY FOR OCTOBER.

2. SUN. *16th Sunday after Trinity.*
9. SUN. *17th Sunday after Trinity.*
15. Sat.. Law of England introduced into Upper Canada, 1792.
16. SUN. *18th Sunday after Trinity.*
18. Tues. *St. Luke Evangelist.*
23. SUN. *19th Sunday after Trinity.*
28. Frid. *St. Simon and St. Jude.*
30. SUN. *20th Sunday after Trinity.*
31. Mon. *All Hallow Eve.*

THE

Canada Law Journal.

OCTOBER, 1870.

## THE MINISTER OF JUSTICE.

The recent visit of Sir John A. Macdonald to the seat of law and learning in Western Canada was the occasion of his many friends and admirers congratulating him upon his restoration to health, after the alarming illness under which he was prostrated. In common with them, we think we may without presumption, on behalf of the profession, add our meed of rejoicing that so eminent a member of the Bar, so distinguished a legislator and the head of the Department of Law in this Dominion has recovered from an attack which so nearly proved fatal, and is again able to resume his duties.

## MASTER IN CHANCERY.

In our February number we touched upon the subject of certain reforms in the Court of Chancery, which pressingly required the interfence of those in authority, and our remarks were mainly directed (1) to the Master's office, and the necessity of having an energetic man as well as a good lawyer at the head of that department; and (2) to the Registrar's office—and as to the latter, particularly with reference to the difficulties in the way of getting money out of Court, and the necessity for some simple and efficient system in that behalf.

In view of the state of things there spoken of, we are glad to learn that the Attorney-General has taken the subject in hand, and has done something towards providing a remedy for at least some of the evils complained of. He has, in the first place, determined to remove the present Master and put in his place a younger and more vigorous man, from whom, if we can judge from his career so far, we may expect much in the speedy and efficient despatch of business. Secondly, he has appointed the present Master to the office of Accountant-General, whose duties have hitherto been performed by the Registrar; Mr. Turner not having performed the duties strictly pertaining to that office, but, owing to the accumulation of work in the Master's office, having done part of the work of that department. Mr. Buell will, as Accountant-General, be of much use, it is thought, in overseeing the financial business of the Court and facilitating the payment of moneys out of Court to the parties properly entitled to them, and relieve the Judges of much troublesome detail in examining accounts, vouchers, &c., which could as well be done by a painstaking, methodical officer.

The gentleman selected to fill the responsible office of Master of the Court of Chancery is Mr. J. A. Boyd, one of the firm of Blake, Kerr & Boyd. He is a young man for the office, and it has been said of not much experience, but if he has, as his success in the profession so far would seem to shew, "an old head on young shoulders," this will be no disadvantage, but the contrary, for there is an absolute necessity of having in that office one who is able, physically as well as mentally, to grapple with and keep down the business which would otherwise so rapidly accumulate there. Mr. Boyd has only comparatively recently devoted his attention exclusively to Chancery practice, but he has taken a good stand on the Equity side, as he had commenced to do previously at the Common Law, so that we have every reason to think that the Attorney-General has made a judicious selection. He enters upon his duties, we understand, early in November next.

It is said that the Attorney-General proposes making various other changes in the offices of the Court of Chancery at Osgoode Hall, the nature of which, however, he has not yet made known.

## LAW STUDENTS' EXAMINATION.

For fear of any misapprehension on the part of law students who are preparing for the next interim examination, we desire to mention that it will take place on the 23*rd November* next and not on the 7*th December*, as stated in the Law Journal Sheet Almanac for 1870.

A correspondent from Nova Scotia, in a letter recently published, asks for information touching the confirmation of deeds of composition and discharge where there is no opposition. We do not clearly see what the difficulty is that seems to impress our correspondent. By sec. 104 the burthen of proof of the discharge being completely effected shall be upon the insolvent until the confirmation is obtained from the Judge. The insolvent can apply for the order or not as he likes—the discharge is good without it, though it may be awkward to prove it; whilst under sec. 104 an authentic copy of the judgment confirming the discharge is sufficient evidence as well of such discharge as of its confirmation.

We notice that J. G. Scott, Esq., Barrister-at-law, has been gazetted as Clerk of the Executive Council of Ontario, in the place of James Ross, Esq., resigned. He will make an efficient and energetic officer.

## SELECTIONS.

### NOTES ON PRECATORY TRUSTS IN WILLS.

In *Quayle* v. *Davidson*, 12 Moore, P.C. 268, it was held that a court of equity "will, if necessary, construe words importing a trust as an expression of hope or confidence." In precatory trusts, on the other hand, words expressing hope or confidence are construed as importing a trust. In each case the courts apply "one of the fixed rules of equitable construction, that there is no magic in particular words." Hill on Tr. 65.

The intention of the testator, of course, is to govern in all cases. So that no informality in words will prevent the creation of a trust where it clearly appears that a line of duty is marked out for the donee, and not merely suggestions made to his discretion: and neither precatory words nor any other will avail to create a trust where a contrary intent is shewn.

But the doctrine of precatory trusts is something more than the converse of the principle in *Quayle* v. *Davidson;* it does not stop with saying that precatory words *may*, under stress of a plainly indicated intent, be construed as importing a trust. It is stated as a rule of presumption; and, in the absence of countervailing circumstances, or in the equipoise of such as conflict, it *requires* that precatory words shall be so construed. The rule was thus expressed by Sir R. P. Arden, Master of the Rolls, in the case of *Malim* v. *Keighley*, 2 Ves. Jr. 333, 335 (A. D. 1795): "I will lay down the rule as broad as this: whenever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it." The precatory word in this case was "recommend."

This statement of the rule is cited because it has been very often quoted and approved; as, for example, in the case of *Knight* v. *Boughton*, 11 Cl. & Fin. 513. 551 (A. D. 1844), by Lord Chancellor Lyndhurst and Lord Cottenham; and in the case of *Homer* v. *Shelton*, 2 Met. 194, 207, by Wilde J. It is criticised, and yet adopted as sufficiently accurate, by Lord Chief Baron Richards, in *Heneage* v. *Andover*, 10 Price, 230.

Perhaps, therefore, when it is said, in relation to precatory trusts (Adams, Eq. 31,) that: "The question in each particular case is merely of construction on the terms of the instrument," the matter is not stated with entire accuracy. The remark, at any rate, is less significant than it would seem to be at first sight; and is not to be considered as denying that there is a canon of construction applicable to precatory words.

In England, the rule is admitted, on all hands, to be an established one; and it runs back, in that country, through a series of approved decisions, for more than a century and a half. *Eales* v. *England*, 2 Vern. 466 (A. D. 1702); *Harding* v. *Glyn*, 1 Atk. 469 (A. D. 1739); *Pierson* v. *Garnet*, 2 Bro. C. C. 38, 226 (A. D. 1786); *Paul* v. *Compton*, 8 Ves. 375 (A. D. 1803); *Cary* v. *Cary*, 2 Sch. & Lef. 173, 189 (A. D. 1804); *Forbes* v. *Ball*, 3 Mer. 437 (A. D. 1817); *Wright* v. *Atkyns*, 1 Turn. & Russ. 143 (A. D. 1823); *Wood* v. *Cox*, 1 Keen, 317 (A. D. 1836); *Shaw* v. *Lawless*, 5 Cl. & Fin. 129 (A. D. 1838); *Knight* v. *Boughton*, 11 Cl. & Fin. 513 (A. D. 1844); *Williams* v. *Williams*, 1 Sim. N. S. 358 (A. D. 1851); *Briggs* v. *Penny*, 3 Macn. & G. 546 (A. D. 1851); *Bernard* v. *Minshull*, H. R. V. Johns. 276 (A. D. 1859); *Bonser* v. *Kinnear*, 2 Gif. 195 (A. D. 1860); *Shovelton* v. *Shovelton*, 32 Beav. 143 (A. D. 1863); *Irvine* v. *Sullivan*, L. R. 8 Eq. 673 (A.D. 1869). And see *McCormick* v. *Grogan*, I. R. 1 Eq. 313 (A. D. 1867); s. c. L. R. 4 H. L. 82.

It has also been generally adopted in this country. *Reed's Adm'r* v. *Reed*, 30 Ind. 313 (A. D. 1868): *Warner* v. *Bates*, 98 Mass. 274 (A. D. 1867); *Van Amee* v. *Jackson*, 35 Vt. 173 (A. D. 1862); *Negroes* v. *Plummer*, 17 Md. 165 (A. D. 1860); *Anderson* v. *McCullough*, 3 Head, 614 (A. D. 1859); *Ingram* v. *Fraley*, 29 Geo. 553 (A. D. 1859); *Lines* v. *Darden*, 5 Florida, 51 (A. D. 1853); *McKonkey's Appeal*, 13 Penn. St. 253 (A. D. 1850); *Lucas* v. *Lockhart*, 10 Sm. & M. 466 (A. D. 1848); *Harrison* v. *Harrison's Adm'r*, 2 Gratt. 1 (A. D. 1845); *Coates's Appeal*, 2 Penn. St. 129 (A. D. 1845); *Tolson* v. *Tolson*, 10 G. & J. 159 (A. D. 1838); *Bull* v. *Bull*, 8 Conn. 47 (A. D. 1830); *Erickson* v. *Willard*, 1 N. H. 217 (A.D. 1818). See also *Harper* v. *Phelps*, 21 Conn. 257.

And it is laid down in the best text-books as an established rule; 1 Jarman on Wills (3d Lond. ed.), 356; 2 Washb. Real. Prop. (3d ed.) 469; Adams' Eq. 30, 31; Hill on Tr. 71; Lewin on Tr. 104.

Nevertheless, the doctrine as to precatory trusts has long been, and is still, fiercely assaulted in many quarters. One might gather from the language of some text-writers, and occasionally of some judges, that there never had been any good reason for adopting it, and that such reasons as there were, had been wholly exploded. *Pennock's Estate*, 20 Penn. St. 268 (A. D. 1853); *Van Duyne* v. *Van Duyne*, 1 McCarter, 397 (A.D. 1862); 2 Story's Eq. Jur. § 1069; Tiff. & Bull. on Tr. 224; 1 Redf. Wills, 713.

These attacks have not always come from the best instructed quarters. Thus, in the year 1853, in *Pennock's Estate*, 20 Penn. St. 268, a very extraordinary and elaborately considered case, the court say: "We may now add that we know of no American cases wherein the antiquated English rule has been adopted." In view of the American cases cited above, is it too much to say that the court ought to have known of half a dozen?

But in some instances these objections have proceeded from judges of high authority, *e. g.*, Lord Eldon in *Wright* v. *Atkyns*, 1 V. & B. 313, 315. See also *Heneage* v. *Andover*, 10 Price, 230, 265; s. c. on appeal, *sub nom. Meredith* v. *Heneage*, 1 Sim. 542; *Sale* v. *Moore*, 1 Sim. 534, 540; *Green* v. *Marsden*, 1 Drew. 646; the judicial comments of this sort, however, have, we believe, uniformly been made in cases which were held not to come within the scope of the rule. Among the text-writers who object to the rule now under consideration, Judge Redfield (1 Redf. Wills, 713) goes so far in his strictures as to say: "This" [to wit, that nothing obligatory is meant], "we think, is what is *always* intended by testators, in the use of these hortatory expressions in their wills, towards the recipients of their bounty. There is scarcely one man in a thousand who would, in such cases, use any such indefinite and optional forms of expression towards those whom he expected to assume a binding duty and obligation. . . . So that, probably, *in nine cases out of ten*, where the courts have raised a trust out of such mere words of wish and exhortation, it has been done contrary to the expectation of the testator, and more out of regard to the moral than the legal duty of the donee."

The italics are our own. These phrases are, certainly, sufficiently broad.

Is this sort of comment upon the doctrine of precatory trusts just? And upon what grounds, if any, may we look to see that doctrine continue to hold its own?

The rule is but one among many; it is a secondary and auxiliary rule,—always subordinate to the cardinal principle that the intention of the testator is to govern. Indeed, it is a rule that has its whole support in a supposed conformity with that principle; and it gives way at once when the two are shown to conflict. There is no sort of difficulty in accepting the rule where it does not conflict with the testator's intention, for no technical words are necessary to create a trust. The difficulty exists in cases, where, without the application of this rule, there is no plain indication of the intent.

Where the doctrine is an established one, as in England, it may safely be assumed that it always accords with the intention of the testator, when the will is drawn artificially and with technical skill.

It is to be noted that, in its strictest definition, it is a rule of very restricted application. It will seldom happen that some indication or other, and some prevailing indication, of a testator's intention, in the use of precatory words, may not be drawn from the facts to which the will is applicable, or from the other language or the structure of the instrument. Thus, in the late and well-considered case of *Warner* v. *Bates*, 98 Mass. 274, the language under discussion was the following clause in a testamentary gift from a wife to her second husband: "In the full confidence that, upon my decease, he will, as he has heretofore done, continue to give and afford my children" [naming all her children by both husbands] "such protection, comfort, and support as they or either of them may stand in need of;" it appeared that some of the children were adults, and without property; that during their whole life they had all been supported at the mother's house and out of her property, and had lived together as one family; that she gave all her property to the husband for life, and left the children nothing at all during that period, unless through the operation of the clause above quoted; and that upon the husband's death she gave all her property to the children, by both husbands, equally; the court were clear in the opinion that, under circumstances like these, the established rule as to the construction of precatory words accorded well with the intention of the testatrix.

It is a trite qualification of the rule as to precatory trusts, and one that has been ingeniously applied so as to take many a case out from the operation of it, that the subject-matter and the person, or object, must be clearly pointed out. But a good deal more significance has been attached to this observation than it deserves. It is a qualification that is not peculiar to precatory trusts. Where the technical phrases for creating a trust are used, and there is no room for question as to the intention, the want of clearness in pointing out the person or property to which it relates, can have only the effect of nullifying that admitted intent. Where precatory words are used, this uncertainty has the same effect, so far as any intention to create a trust is made out; and so far as there is a doubt as to the intention, it also has a bearing upon the solution of that question. The intention being made out, however, no greater effect is to be given to the want of clearness in the one case than the other; the rule being equally applicable always, that in order to create a trust there must be,—1, sufficient words; 2, a certain subject; and, 3, a certain object: *Williams* v. *Williams*, 1 Sim. N.S 358, 369, 370; *Briggs* v. *Penny*, 3 Macn. & G. 546, 556; 1 Jarman on Wills (3rd Lond. ed.), 359. In *Bernard* v. *Minshull*, H. R. V. Johnson, 276, we have a case where precatory words availed to prevent the donee from taking a beneficial interest, although the intended trust failed for uncertainty. This case shows, first, that a want of certainty is not conclusive as to the effect of precatory words; and, second, that it is fatal to a trust of any sort.

What are called precatory words are of very different degrees of force. One of them, the word "confidence," is a very strong one; indeed, in legal usage, it comes near being the equivalent of "trust." It is often mated with it; "trusts and confidences" is the phrase used in the Statute of Uses and elsewhere; and under the term "Trust," Burrill's Law Dictionary, after giving "a confidence" as one of its definitions, goes on to add: "The radical idea of a trust is confidence, and this is the word employed by Lord Coke in his definition of a use, which has been adopted by Mr. Butler and Mr. Lewin as the best and most exact definition of a *trust*." In *Meredith* v. *Heneage*, 1 Sim. 542, 556, with reference to the words "in full confidence and with the firmest persuasion," the court say, "unquestionably these words are extremely strong." Surely they are. It was considered in that case that there was enough else to outweigh them; but in the absence of a clear indication to the contrary, one may well wonder how it should ever be thought that a testator, in laying a donee under such solemn and stringent injunctions, could intend that he might keep the gift while he disregarded them.

There are many other words—of wish, recommendation, desire, entreaty, expectation and so forth—which have not, intrinsically, so much force. To all of them alike, however, one powerful consideration applies,—they are used in an instrument whose primary purpose it is to transfer property; and they are used as a part of the phraseology for transferring it. A will may be, and is, sometimes, availed of, incidentally, for the expression of the testator's mere wishes or opinions; but that is not its purpose, nor is it ordinarily or mainly used for such communicatious. It seems to be reasonable—where these expressions are found in such a document, and where one who has a right to order, expresses, without qualification, his expectation, or his wish, that something shall be done—to say that "the expression of his wishes is deemed to be the expression of his will" (Wilde, J., in *Whipple* v. *Adams*, 1 Met. 445), and that "the mode is only civility" (Lord Loughborough, in 1 *Malin* v. *Keighley*, 2 Ves. Jr. 529, 532). How shall one determine that the testator would give any thing if he did not suppose that his "expectation," or "wish," or "confidence," would be heeded? Assuming, as we do, that he has given no plain indication of his intention in other ways, we have the two facts, that property is given to A. B., and that the giver, in bestowing it, desires that it shall be applied in a particular way. Why shall it not be so applied? "He uses," says Redfield (1 Redf. Wills, 713), "such precatory words, because he desires to leave it to the *discretion* of the donee; and if he intended to control that discretion, he would adopt very different language" This is easily said, but it is not convincing. One has only to reply, "Why, then, does he not *say* that he intends to leave it to the discretion of the donee? Why does he not at least intimate it, so as to lift from the conscience of the donee that weight which his language must needs lay upon it." Every man feels the moral stringency of such injunctions. No person, in giving property, and coupling these expressions with the gift, can fail to be aware how impressive they are: they are, and are meant to be, extraordinarily weighty. It seems to us, therefore, that the law is wise and prudent in assuming that where a testator intends that such injunctions shall have no other force than that of suggestions to the discretion of a donee, he will indicate it, and in requiring whenever he does not indicate it, and the conscience of the donee is found to be evading them, that they shall be taken up and enforced by "the general conscience of the realm—which is Chancery."

As to the objections, then, which are taken to the doctrine of precatory trusts, it may be said generally,—

I. That so far as they amount merely to saying that the cases have sometimes been decided on grounds too narrow and technical, or that the rule has sometimes been pressed with too little referenco to other rules equally operative, they may be admitted to have much force.

II. That so far as they serve to indicate a desire for a broader statement of the rule, so as to include certain admitted limitations of it, one would hardly care to find fault with them.

III. That so far as it is desired to insist chiefly on the primary rule as to the intent of the testator, to be collected from the whole instrument, there is no need to contend against them. Thus Redfield cites, with approbation (1 Redf. Wills, 707), the language of Lord Cranworth, in *Williams* v. *Williams*, 1 Sim. N. S. 358, 368, to wit: "The real question in these cases always is, whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party; leaving it, however, to the party to exercise his own discretion."

That is all well enough; but it hardly touches the difficulty, which is one relating to the admission of a subordinate rule of presumption to assist in settling this "real question."

IV. That, upon the whole, the strong language of Bigelow, C. J,, is, perhaps, not too strong, when he says, in *Warner* v. *Bates*, 98 Mass. 274, 277: "The criticisms which have been sometimes applied to this rule by text-writers and in judicial opinions, will be found to rest mainly on its application in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent."—*American Law Review.*

## CONTRABAND OF WAR.

The war between France and Prussia will make it necessary for commercial lawyers to rub up their old lore on the subject of "contraband," a topic of much import to shippers, ship-owners, and insurers. The decision whether any particular cargo of goods is or is not contraband of war lies theoretically as well as practically with the Prize Court of the capturing power, whose decision is a decision *in rem*, and not to be impugned in any court. It will be remembered that though a foreign judgment *in personam* may be reviewed, a foreign judgment *in rem* may not. There has indeed been a disposition on the part of the present Lord Chancellor, among other judges, to hold that even a foreign judgment *in rem* may be reviewed if on its face it has proceeded on a gross disregard of the comity of nations (see *Simpson* v. *Fogo*, 11 W. R. 418; and the report of *Castrique* v. *Imrie*, in the Exchequer Chamber, 9 W. R. 455); but it is in a high degree improbable that a foreign Prize Court decision would ever be disregarded by any of our courts. Indeed apart from their being decisions *in rem* there appears to be a sort of understanding that Prize Court decisions are conclusive on the matters before them. When we speak of a Prize Court decision being unquestionable in the court of another power we shall of course be understood as meaning unquestionable for the purposes of questions arising in the foreign court and hinging upon the question decided in the Prize Court, as, for instance, in insurance matters.

Contraband may be confiscated by the captor, beyond which there is this further consequence, that any insurance upon it is void. A contract to insure contraband is void, because it is a contract to export under circumstances which render the exportation illegal, and if the act be illegal, an insurance to protect the act is illegal likewise.

At the present moment all sorts of questions are being asked as to whether or not this, that, and the other is contraband of war. Without following Grotius into his three classifications of munitions of war, goods applicable for pleasure and not for war, and goods of a mixed nature (*ancipitis usus*), we will state as shortly as we can the present acceptation of the subject. All muniments of war conveyed to a belligerent are of course contraband; also all goods conveyed to a blockaded port. As to what is or is not a blockaded port, it is material to notice the 4th article of the French Emperor's proclamation, that "blockades, in order to be binding, must be effectual; that is they must be maintained by a force really sufficient to prevent the enemy from obtaining access to the coast"—this merely expresses what has been decided in our own English courts. Two things are necessary to constitute a blockade binding on neutrals—first, that it should be notified to their country; and secondly that there should be really a substantial blockade. It is not enough for a belligerent to proclaim a blockade which he cannot maintain, but of course a blockade does not necessarily cease to be a blockade because one or two vessels manage to run the gauntlet. The blockading power is entitled to consider its notification of a blockade to the Government of a neutral power as a notification to all the subjects of that power. But it seems that, with reference to the validity of an insurance, there is no such rule, and the knowledge of the insurers is a question of fact to be determined (Lord Tenterden in *Harratt* v. *Wise*, 9 B. & C. 717). In *Naylor* v. *Taylor*, (ib. 721) a master sailed to a port not knowing whether it was blockaded or no, and not intending to violate the blockade; the policy, also, on the ship was framed upon a doubt whether the blockade would be subsisting by the time the ship arrived out; it was held that the voyage, and therefore the policy, was not illegal. We need not, of course, say that all persons would be regarded as having notice of matters of public notoriety.

As to goods in general, no hard and fast definition of contraband is possible. The doctrine of "occasional contraband" (*i. e.*, that destination, &c., &c., may make anything contraband) has, indeed, been found fault with by some text writers, but may be regarded as established in modern use. For the purposes of the present war, it must be assumed that all sorts of things may be contraband according to their destination, the exigencies of the belligerent at the port to which they are addressed, and a hundred other varying circumstances. Coal, for instance, may fairly be considered contraband if conveyed to a port in which belligerent steam-rams are lying. Resin, rope, and other articles capable of being "naval stores" may be contraband when shipped for a belligerent dockyard port. Horses may be contraband if shipped out to be landed for belligerent use. Provisions may be contraband if intended for the same end (some writers have maintained that such necessaries ought to be incapable of being contraband, but that is not the rule now at any rate). Some articles are from their nature more capable of being contraband than others; thus it is very easy to understand the circumstances under which a cargo of saltpetre might be contraband, but (except, of course, as exported from or imported into a blockaded port) it is almost impossible to conceive how a cargo of violins could be contraband.

It may be useful to give a few notes of "contraband" cases decided by our own Courts during the last French war.

In *The Jonge Margaretha* (1 Rob. 193), Sir Wm. Scott afterwards Lord Stowell) observing that provisions "generally are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it," held that a cargo of cheese shipped by a Papenberg merchant from Amsterdam to Brest was contraband, Brest being a naval arsenal of France, in *The Zelden Rust* (6 Rob. 93), a cargo of cheese shipped from Amsterdam to Corunna was held contraband, Corunna being, "from its vicinity to Ferrol, a place of naval equipment, almost identified with that port." In these cases notice was taken of the fact that the cheese was of the quality served out in the French navy. But in *The Frau Margaretha* (6 Rob. 92) similar cheese shipped from Amsterdam to Quimper was held not contraband, on a presumption that Quimper, though near Brest, was sufficiently remote for carriage purposes to rebut a presumption of the cheese being destined thither. In *The Range* (6 Rob. 127), it appearing that a cargo of biscuit for Cadiz was shipped under false papers, and had come from the public stores at Bordeaux, both ship and cargo were condemned. In *The Edward* (4 Rob. 69) wine was seized in a Prussian ship, ostensibly bound from Bordeaux to Embden, but hovering near the French coast. Here the Court examined the ship's log, and arriving, by the assistance of the Trinity Elder Brethren, at the conclusion that the intention was to get into Brest condemned the cargo.

In *The Charlotte* (*Nock*) (5 Rob. 275), Swedish copper, in sheets, but not adapted for ship-sheathing, was held not contraband. In *The Graeffen Van Gottland* (H. of L. not reported), a shipment of masts in a Russian ship for Cadiz, was condemned. The latter decision was commented on in the judgment in *The Charlotte* (*Koltzenburg*), 5 Rob. 305, in which a cargo of masts in a Russian ship for Nantes (a mercantile port), was condemned, the Court holding that with regard to an article such as masts, the character of the port of distinction was immaterial, since even in a mercantile port masts might be fitted into privateers (but note that privateering is not on foot as between France and Prussia). In *The Twee Jeffrowen* (4 Rob. 242), Sir William Scott laid it down that pitch and tar are universally contraband, "unless protected by treaty, or unless it is shown that they are the produce of the country from which they are exported." Similarly, in *The Neptunus* (3 Rob. 108) it was held that sailcloth is universally contraband, even when destined for ports of mere mercantile equipment.

We may also remind the reader that as regards *mixed* cargoes, "to escape from the contagion of the contraband, the innocent articles must be the property of a different owner" (Bynkershoek, and see *The Staadt Embden*, 1 Rob. 30). Where a doubtful cargo is seized and afterwards released by the Prize Court, it is a frequent practice to saddle it with the captor's expenses (see *The Gute Gesellschaft Michael*, 4 Rob. 95).—*Solicitor's Journal.*

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## HUMOROUS PHASES OF THE LAW.

### THE CONDUCT OF COURTS.

It is popularly supposed that the study and pursuit of the law are unattractive. It is true that the court room is not a prepossessing apartment. To those unfortunates of our race who seem to have an innate bias toward depravity, its interior must be quite forbidding. It is somewhat awful, even to those unaccustomed litigants who approach it in a harmless way, to contest civil rights. It is peculiarly a bugbear to nervous women. To some sickly ladies the height of human infelicity seems to be an imaginary liability to be dragged to the witness stand. They know they never could live through it. We often wonder that their husbands do not contrive to have them subpœnaed, for the sake of the experiment.

But on more familiar acquaintance, these horrors wear away. The associations of the court room are apt to degenerate into dullness, and its visitants are more prone to gape than to tremble; and yet, to one who is an habitual frequenter of its precincts, its lessons are not unmixed with the humorous. On entering its venerable portals, how quiet and drowsy is the aspect of every thing! The hall is shrouded in a dim, irreligious light; the sun, that usually unblushing orb, seems diffident about looking in upon this mysterious realm of green baize and red tape. Long rows of corpulent books, almost buried in dust, suggest forgotten researches of scholars and jurists. The flies on the windows are of the fattest and laziest kind —regular chancery suitors; while the spiders that conceal their webs in the recesses of the dome, are marvelously agile and sharp,—complete solicitors in their way. The sheriff's mastiff, sleeping at the door of the prisoners' box, has an extraordinary severe and unfathomable countenance, the opposite of that of his master, who is in most instances a good-natured man. Half a dozen superannuated persons, bearing long and unwieldy poles, flit in a noiseless manner about the room, rendering themselves generally useless and in the way. There is a bald fat man, with spectacles, upon the bench, whose chief occupation seems to be to discomfit one or the other of two thin bald men, with spectacles, at the bar. Directly under the judge's bench sits the clerk, whose principal duties, or rather pleasures, are to make fees, and to construct good citizens out of all sorts of foreign materials in the rough. Close at his elbow, at this moment, sits a prisoner, who with a broad grin on his face is laborously signing his name to a certain paper writing; well may he smile, for it is "his own recognizance" for bail that he is subscribing, and he is doubtless thinking what a "muff" the judge must be to let him off on such easy security. The aged crier, who looks as if he might have come over in the "Mayflower," rises and drones forth his mechanical "oyez," in the same whine that has characterized it ever since the blessings of legal forms dawned upon its perishing race. The lawyers, who really act among themselves as if they are a good sort of fellows, and seem unseasonably happy and jovial for persons having so much on their consciences, are talking and laughing, in no wise dismayed by the caution of the crier's formula. They evidently feel under no more restraint than the disrespectful son, whose father excused his sauciness, on the ground that they were so well acquainted that they said almost any thing they pleased to each other. "Silence in court!" says his honor, rapping the bench with the knife with which he has been peeling an apple while he read the morning newspaper; at the same time looking severely in every direction except that from which the disturbance evidently comes. At this signal, the superannuated persons, bearing poles, agitate themselves out of their somnolency, making great pretense of activity in suppressing an imaginary tumult, and shortly go to roost on their poles again. All this time the hum of the great noisy world outside acts like a soporific on the senses.

"Call the grand jury," says the judge. After they are called and sworn to keep all sorts of secrets, including "their own and their fellows" (and here seems to be a reason why women, in any millenium of female sovereignty, can never act as grand jurors), his honor appoints the most corpulent and inactive one as foreman. Then, after a caution from the old crier to the bystanders to "keep silence on pain of fine and imprisonment" (which seems quite unnecessary, because at this juncture the spectators are always in breathless suspense to learn if it is possible for the judge to say any thing new), his honor rises, and the jury also rise, with unmixed awe and respect imprinted on their countenances, and his honor proceeds to charge them, "with horse, foot and dragoons." It is customary to observe in opening, that although they may properly be supposed to be somewhat familiar with their duties (which is not improbable, considering that the public are thus made acquainted with them three or four times a year), yet it is required of him to make a few general remarks. He then proceeds, at an hour's length, to inform them that they are the conservators of the public peace, and the safeguard of society; that they are selected from the most intelligent and respectable portion of the community to protect their persons and property from the hand of the violent, and to point out the offender to public justice. He then overwhelms them with a sense of their tremendous responsibility, and the solemnity of their position. He then impresses on them the novel theory that no man is so high as to be above, or so low as to be beneath, the reach of the law. He then opens up to them the terrible consequences which would ensue if they should fail to preserve strict secrecy as to their deliberations and proceedings, and gives them a timely caution to be impartial and unprejudiced. He then usually reminds them that their whole duty is pointed out in their oath, which he proceeds to analyze, making each component part the text for a short discourse of say fifteen minutes; but this, as it is merely a repetition of what he has already said, it is unnecessary for us to go through. He then reminds them of the necessity of being utterly devoid of partiality and prejudice. Next he calls their attention to several offences which our legislature have deemed so much more heinous than all others, as to be worthy of specific reprobation, such as vending intoxicating beverages to drunken men, without having paid the state for the privilege; lending money at the rate of interest which the parties think it worth, when it happens to exceed what the state thinks it worth; taking money from a candidate for voting for him when the purchased party would have voted for him in any event, and so forth. These injunctions are undoubtedly most excellent in a moral view, but are never known to produce the slightest practical effect. He then again exhorts them to divest their minds of every thing like partiality or prejudice. And finally he winds up, in a comprehensive, well-rounded and elaborate sentence (usually written beforehand), designed to comprise all that he has said before (with an additional remark about the impropriety of partiality and prejudice), and thus impress it on their minds; and with a bland and soothing reminder of the reliance that the community place upon their unimpeachable and unquestioned and unvarying integrity, intelligence and impartiality, he dismisses them to their secret chamber, under the guidance of one of the paralytics, who descends from his roost for the purpose. The reporters for the press are very busy all this time, and next day the newspapers, with remarkable unanimity, compliment his honor on his able, learned and eloquent "charge to the grand jury." It has been frequently noticed that the said reporters, at or about the same time, are to be seen emerging in a body from some temple of Bacchus conveniently near the temple of justice, with a satisfied expression of countenance; and it has been likewise noticed that the grand jury are entirely oblivious to the fact that the priest of the first-mentioned temple is without orders, or license, notwithstanding its propinquity to the last-mentioned temple.

Next, the clerk calls the petit jury, and the judge if fresh in office, or not looking for a re-election, imposes fines on those delinquents who fail to appear and answer; but such fines are more for show than for service, and are remitted on very trivial grounds. His honor then announces that he will hear excuses from jurymen, who desire to be relieved from the necessity of attendance. These excuses are as various as those of the guests summoned to the feast in the parable, and comprehend every ailing and disability known to medicine from bronchitis to bowel complaint, from piles to paralysis, from corns to consumption. A juror was once excused for the reason that he had no control over his bowels, and was, therefore, unable to sit for any length of time. Immediately succeeding him a juror asked to be excused on the ground that his wife was momentarily expecting to be confined. His request was, of course, granted—the judge, who was a notorious wag, remarking that the difficulty complained of by the first witness seemed quite prevalent in that locality. Deafness is a standing excuse for sitting, and where satisfactorily established, is allowed to prevail. A doubtful instance once arose in northern New York, where the juror alleging that he could hear only with great difficulty, the judge asked him if he did not hear his charge to the grand jury, just delivered? "Why, yes," was his reply, "I heard it, but I couldn't make head or tail of it!"

If any cause is ready for trial, the clerk calls a jury especially for the purpose. Perhaps there are not names enough in the box. "Summon talesman," says the judge. At this announcement there is an evident fluttering amoung the spectators, and if the cause is understood as likely to be tedious or protracted, as many of them as can escape by incontinent flight, while the sheriff singles out those who voted against him, or those against whom for any other reason he holds a grudge.

After the exercise of a good deal of professional finesse, a jury is secured, and the plaintiff's counsel opens the case. This is an admirable opportunity for the exercise of the imaginative faculties, for the jury, if the case is strikingly and glowingly presented, are apt to have a corresponding idea of it fixed in their minds, and no matter how much the testimony may fail to support it, an immense preponderance of opposing evidence is requisite to efface the impression.

Witnesses are then examined. Their oath is to tell the truth and nothing but the truth; but this means, in answer to the questions of counsel and nothing beyond. And so if the witness is disposed to tell a little truth on his own account, he is checked, and his testimony is termed "irresponsive." Everybody is, of course, aware of the tortures inflicted on witnesses. The popular belief that no man, however truthfull and intelligent, can perserve his consistency under the fire of cross-examination is so firmly fixed that no efforts on the part of the profession can remove it. The prevailing difficulty is that no witness is content with simply answering a question, and indeed very few can answer the simplest question at all. Suppose the witness is narrating a conversation, and says that in the course of it defendant called plaintiff a fool, a scamp, and thief. "Will you swear," says Counsellor Sharp, "that he used the word thief?" And the answer will be, "I think he did." "I am quite sure he did," or "I am positive he did;" or any thing else but yes or no, the only possible answer to the question. The witness is willing enough and honest enough, but not reflective enough,; or he is obstinate, and, although he sees the point, is unwilling to admit that he cannot swear positively to the circumstance, because he has no doubt of it. So, after awhile, under the skillful badgering of counsel, he becomes mad and almost desperate, affirms every thing his counsel asks him, negatives every thing else, and thus, rushing like a bull at a gate, beats out his brains against the stubborn subtleties of the law, and then out of court whines about the unfairness of counsel. Counsel are undoubtedly frequently unfair in the examination of witnesses, but their unfairness generally consists in taking advantage of the proneness of human nature to be unfair, or its inability to be candid. One would suppose that lawyers would themselves make good witnesses, but the contrary is the fact; indeed there is but one class of witnesses less endurable, and that is physicians, who cannot divest themselves of the habit of lecturing and the use of technical language.

After the evidence is all in on one side, the opposing party proceeds to contradict, explain, modify, or discredit, and after he has had his "innings," the plaintiff goes at it again, and so on until the case will admit of no farther contradiction, explanation, modification, or discrediting, and then the jury are ready to be argued at. The defendant's counsel presents one view, and then the plaintiff's counsel presents another entirely different, each invariably assuring the twelve that in the course of his professional practice he has never met with so clear a case for his client, and imploring them so to decide that they can lay their heads on their virtuous pillows at night with the proud consciousness of having rightly discharged their duties. And here let us observe, that the compliments of his honor to the grand jury are nothing to the flattery and eulogy which the counsel pour upon the heads of the petit jury. If a man wants to find out what a surprisingly clever and estimable fellow he is, let him get himself impaneled. But as there is no rose without its thorn, so the jury are not exclusively treated to these sweets. The denunciations which the counsel respectively avow themselves ready to heap on their heads, supposing them so lost to honor and rectitude as to decide against their client, are almost as fearful to contemplate as the curse of the Catholic church upon backsliders and heretics, and it is to avoid this awful contingency, perhaps, that juries so frequently disagree. This is the way in which these things strike a layman, but we suppose that among the profession they are all received in a Pickwickian sense. After the jury have been thoroughly kneaded in this way, the judge flattens them out with his rolling-pin of law, and stamps them with almost any tin pattern he pleases, in the shape of a charge. The counsel then have a sharpe encounter with his honor, to entrap him in some erroneous charge or a refusal to make some proper one, and thus obtain an exception on which to found a successful appeal. The jury then retire in charge of one of the paralytics and a pole, and are kept in strict seclusion on a light diet of water, until they agree, or until in case of disagreement the judge chooses to release them. The propriety of starving a jury into a verdict is one of the good jokes connected with the law, which it would take us too long to explain. The English of old times, having a much keener sense of humor than ourselves, used to cart the jury around, following the judge on his circut, until they should agree; and it is even said, that some intensely witty and pleasant fellows, like Scroggs and Jeffries, when the wretched creatures proved unyielding, would sometimes get rid of them by dumping them into some convenient ditch. It is true that now-a-days the counsel usually consent that the jury may be fed, but the *theory* of the law is now, just as it was under the aforesaid humorous judges, that they are kept "without meat or drink, water excepted."

And this is the ordinary course of a trial at law. In all these proceedings, that which strikes the spectator most forcibly is the prevalence of forms. Some of these forms are as old as the common law itself, and as little varied by lapse of time as the street cries of London. These seem singular, but are necessary. Legal affairs must be transacted in some settled and unvarying method. The error is in not accomodating these forms to the growing intelligence and civilization of the age, and in preserving in the nineteenth century the quaint practices of the sixteenth. For instance, it would be difficult to assign any good reason for the practice of starving a jury into agreement, and as the practice has fallen into disuse, why should we preserve the theory?

Another striking feature of trials at law is the apparent equality of the contest. An unsophisticated observer would suppose, that as one side must be right and the other must be wrong, it would clearly and speedily appear which is right and which is wrong. But two skillful lawyers are like two experts at any game of skill or endurance, and the result is that the clearest case becomes at least somewhat doubtful, and the event quite problematical. The arguments on both sides seem irrefragable as they are separately presented. The advocates elude one another's grasp like weasels. They are lubricated all over with the oil of sophistry and rhetoric. It is quite as difficult to put forward a suggestion that is not plausibly answered, as it is to make a run at base ball, or a count at billiards after a skillful player has left the balls in a safe position.

Another conclusion forced on the mind by observing the proceedings of courts is, that advocacy is much more easy than impartiality; that it is almost impossible for man to divest himself of prejudice and to overcome the force of habit and education. There is only one judge who is impartial, and even he has strong leanings against the wicked. So in almost every case we hear the judge discussing the facts, and arguing on probabilities and credibilities, and, in the same breath, instructing the jury that these questions are their peculiar province and entirely outside his own. Human nature is alike all over the world, in all times, in all stations. Man is a disputatious animal, and logically dies hard. Adam must needs dispute with the anchangel. Thereupon we must not blame our judges for taking sides. The Irishman's hands itch for a "shillalah" when he sees a "free fight" going on between a few of his friends, not so much for love of either party as to gratify an innate pugnacity, and if his own skull is cracked in the encounter he bears no malice. So the judge, when he sees so much fine logic flying about the heads of the jury, yearns himself to have an intellectual whack at them, and sometimes in his ardor his reasoning recoils, like the eastern boomerang upon his own reverend head.

But finally, the most remarkable sensation that courts of justice are subject to, is experienced at the sight of a pretty woman. Let a comely and well-dressed woman enter the court room, and at the first rustle of her silken gown every man present seems to lose his head. Talk of the equality of the sexes! A man stands no more chance in a lawsuit against a good-looking woman, especially if she is in weeds, than he does of being saved without repentance, or of being elected to congress without spending money. Portia would have been even more potent in petticoats. The lawyer who should undertake to cross-examine a woman sharply would be considered a brute. Even to ask her age is a hazardous experiment. When she testifies to hearsay, or what she said herself, or what she thought or thinks, or anything else improper, the judge merely lays down his pen and smiles, and the jury believe every word of it. And whether party or witness, let her take out a black-bordered white hankerchief, and put it to her eyes, or nose—it makes no difference which—and the jury will treat her antagonist with about as much consideration as the early Christian martyrs received from the wild beasts at Ephesus. A man may be put off with sixpence; a woman's verdict always carries costs. Even the gallows has no terrors for her; its noose relaxes and refuses to clasp her fair neck; it is only when it embraces Adam's apple that it preserves its hold. And yet the women are trying to break this spell by becoming lawyers and jurymen! I should not be surprised if they succeed in getting hanged, if they accomplish this purpose. The charm of their unaccustomed and artless presence will be gone, and if they demand the privilege of acting like men, they will perhaps be treated like men.—*Albany Law Journal.*

## CANADA REPORTS.

### ONTARIO.

### COMMON LAW CHAMBERS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Scott v. School Trustees of section one in Burgess and section two in Bathurst.

*Amending return to writ of execution—Delay.*

*Held*, that the returns to writs of *fi. fa.* and *ven. ex.* lands could be amended so as to make them correspond with the facts (but upon terms), although a sale had been made under them, and after a lapse of over ten years.

[Chambers, April 11, 1870—*Mr. Dalton.*]

The plaintiff having obtained a judgment against the defendants caused a writ of *fi fa.* lands to be issued on the 19th June, 1858, under which a school-house and lot belonging to the defendants was seized on the 14th July, 1859.

A writ of *ven. ex.* lands being issued on this, the sheriff assumed to sell the school-house and lot to the plaintiff for the sum of £60 No money was actually paid. The court of Queen's Bench in an action of ejectment brought by the plaintiff on the sheriff's deed held that nothing passed by it, as the sheriff could not sell the lands of a school corporation (see report of this case in 19 U. C. Q B. 28).

The plaintiff took no steps in the matter until the 3rd February, when a summons was obtained on behalf of the plaintiff and the sheriff calling on the defendants to shew cause why the sheriff should not be allowed to amend his return to the writ of *fieri facias* against lands issued in this cause on the 15th day of June, 1858, by making the same as a return that the defendants had no lands in his bailiwick whereof, &c., and why the writ of *venditioni exponas* issued in this cause on the 19th July, 1859, and all proceedings thereunder, and the return made thereto by said sheriff should not be altogether set aside and quashed.

Or why the said sheriff should not be allowed to amend both said returns by making the first a return of lands on hand to the value of one shilling, and the second a return that he had levied and made of the lands of the said defendants the sum of one shilling.

Or why the said sheriff should not be permitted to amend his return to the said first mentioned writ by making the same a return of lands on hand to the value of one shilling, and why the said writ of *ven. ex.* should not thereupon be amended accordingly.

Or why the said writ of *ven. ex.* should not be amended by inserting therein the return actually made by the said sheriff to the said writ of *fieri facias*, and by striking out of the same the recital that the sheriff had taken lands to the value of the damages recovered in this cause.

Or why such other order should not be made, and such relief afforded to the plaintiff, and upon such terms as to the said presiding judge might seem proper.

*J. A. Boyd*, shewed cause.—This application cannot succeed after the great delay that has taken place, and after there has been a change in the ratepayers and in the limits of the school section. The purchaser knew what he was buying, and the maxim *caveat emptor* must apply. See *Corporation of Frontenac* v. *Corporation of Kingston*, 20 U. C C. P. 49; *Austin* v. *Corporation of Simcoe*, 22 U C. Q B. 73. In case an amendment is ordered the plaintiff must reconvey and pay the costs of the ejectment suit.

*Osler, contra.* The amendment can be made, and it is not too late: *Bull* v. *King*, 8 U. C. C. P. 474; *Lee et al.* v. *Neilson et al.*, 14 U. C Q B. 606; *Cannan* v. *Reynolds*, 5 E & B 301; *Holmes* v. *Tutton*, 25 L. T. Q. B. 177; *Webster* v. *Emery*, 10 Ex. 901; *Cavenagh* v. *Collett*, 4 B & Al. 279; *Reg* v. *Sheriff of Portheline*, 1 Marsh. 344: *Reg.* v *Sheriff of Wilts*, 8 J B. Moore 518; *Green* v. *Glasbrook*, 2 Bing N. C 143; *Wood* v. *Grimwood*, 10 B. & C 689; *Welsh* v. *Hall*, 9 M. & W. 14; Sewell on Sheriffs, 384-5; Ch. Arch 1557. The plaintiff is prepared to give a conveyance and register it.

Mr. Dalton—As far as regards this application to amend the sheriff's returns to the writs of execution, it seems to me the case should be looked at as though the defendants were persons acting in their own right. The matters urged for the defendants, arising from the peculiarity of their position as school trustees, must be considered in another place. The plaintiff will, very likely, find great difficulties in his way when he seeks to levy his debt—perhaps insuperable difficulties—but I do not see that they are proper to be urged against him on this application which is merely to make the record according to the truth.

The sheriff's return now shows a satisfaction of part of the judgment, which has turned out to be entirely illusory. No money was really made. The sheriff executed to the plaintiff a deed of the school-house at the price which the plaintiff bid for it—by that deed nothing passed. The defendants have always held the property, and have used it as a school-house without interruption, and as the plaintiff really got nothing, and the defendants really lost nothing, why should an entry, which is not true, be allowed to remain on the record, that by these means the plaintiff's judgment has been partially satisfied.

When the plaintiff seeks to enforce his judgment, the position of the defendants as trustees, the lapse of time, the change in the school section, and other circumstances will, no doubt, be urged against him. It may be, for all I know, that he will have no remedy—but that is not for me to consider. The question now is whether the additional difficulty of there being conclusive evidence of satisfaction of part of his debt, which was in truth never made, is to remain in the plaintiff's way.

The sheriff's returns should be amended, as it seems to me, upon the plaintiff re-conveying free from encumbrances all interest in the land derived under the sheriff's deed, and upon his crediting on his judgment the defendants' costs of the ejectment suit, as between attorney and client, discounted at 6 per cent. per annum to the day of the entry of plaintiff's judgment, and upon plaintiff paying the costs of this application.

*Order accordingly.*

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## Brown v. McGuffin.

## Great Western Railway Co. *Garnishees.*

*Attachment of debts—Assignment—Notice.*

The judgment debtor, through his sub-contractors, delivered to the garnishees certain railway ties, and gave the sub-contractors an order on the garnishees for all money coming to him therefor. Subsequently to this, but before the garnishees had any notice of the above order, they were served with the attaching order in this case.

*Held*, that the order in favor of the sub-contractors operated as an assignment of the fund to them, although there was no notice of it to the garnishees, they not having been led by the want of notice to alter their position so as to make it inequitable as against them to enforce the assignment.

[Chambers, April 23, 1870—*Mr. Dalton* ]

This was an application to attach a debt alleged to be due from the garnishees to the judgment debtor.

The facts were, that the judgment debtor dedelivered to the garnishees 1326 railway ties, through his sub-contractors, Ford and Baker, at one of the stations of the company, under a contract by him to supply the company with a much greater quantity at 25c per tie

The garnishees acknowledged to owe the judgment debtor $331.50 for these ties, less a drawback of ten per cent., which it was agreed should abide the fulfilment of the contract; but as the judgment debtor desired to be released by the garnishees from further performance of his contract, they were willing to pay also the ten per cent. upon receiving proper releases in that behalf from the judgment debtor. The amount less the drawback was $289.35.

The judgment debtor denied that he owed the garnishees anything, and said the ties had never been delivered, but were still the property of Ford and Baker, the sub-contractors who delivered the ties at the station. He annexed to his affidavit a copy of the agreement between himself and Ford and Baker, in which the latter stipulated that the ties to be delivered by them, should not be in the possession of the judgment debtor until the payments were made as thereinbefore mentioned, that is, payment at 23 cents per tie for all ties delivered, less a drawback of ten per cent.; and he further swore that an order on the company was given by him to Ford and Baker, or rather to Wm. McCosh their attorney, entitling him to receive for them all moneys they should be entitled to for ties delivered. This order, he swore, was intended to have been given at the execution of the sub contract, but was not in fact given till the month of February following.

Ford and Baker in their affidavit vehemently insisted that they had not delivered the ties, and that the act of the company in inspecting them, and crediting the judgment debtor with the price, was entirely unauthorized by them.

Mr. Dalton—It is plain that the garnishees had no notice, previous to the attaching order, either of the above clause in the agreement between the judgment debtor and Ford and Baker, or of the order in favour of McCosh.

I take it to be clear law, that an attaching order has no operation upon debts of which the judgment debtor has already divested himself by assignment; he must have both the legal and beneficial title.

Two questions present themselves here.

First—Under the circumstances, can Ford and Baker insist that there has been no delivery? They did not before the attaching order inform the company of their position; and they delivered the ties upon the grounds of the company, apparently in performance of the contract of the judgment debtor. Had the company altered their position, as by payment to the judgment debtor, Ford and Baker would have had no remedy.

Several considerations on either side present themselves, and upon the whole, if I were driven to decide upon this point, I should think that Ford and Baker might still assert that the property had not passed from them. But I omit many observations which arise, as I think there is another ground upon which I may more satisfactorily decide the case.

Secondly—Can Ford and Baker assert, or can the judgment debtor assert for them, that the order upon the company is an equitable assignment of the fund in their favour, sufficient to defeat the claim of the judgment creditors? I think that they can. In Story's Equity Jurisprudence, secs. 1043-4, 1047, 1047 *a*, it is said that any order, writing, or act, which makes an appropriation of a fund, amounts to an equitable assignment of that fund, and that may be by parol as well as by deed. "But," as is said in sec 1047, "in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, *for otherwise a priority of right may be obtained by a subsequent assignee*, or the debt may be discharged by a payment to the assignor before such notice."

Very recent cases, however, show contrary to what had been formely held, that *as respects third parties*, notice to the debtor is *not* necessary to perfect the equitable assignment of a debt. In *Watts* v. *Porter*, 3 E. & B. 743, it was decided by the Queen's Bench, after time taken to consider, that it was necessary, but Erle, J., dissented. That case was decided in 1854, and has often since been observed upon and doubted.

In *Pickering* v. *Ilfracombe Railway Co.*, L. R. 3 C. P., at page 248, Bovill, C. J., says:—"The last objection urged by the defendant's counsel was that notice of the assignment must be given to the person whose debt is assigned, in order to make the assignment available as against a creditor. The validity of this objection turns upon the doctrine of the courts of equity. As between the assignor and the assignee, it is clear that no notice is necessary. As to third persons there has been some difference of opinion: the majority of the Court of Queen's Bench in *Watts* v. *Porter*, 8 E. & B. 743, holding that the assignment without notice was inoperative as against a subsequent judgment creditor; but the Lord Chancellor (Cranworth), and Lord Justices Knight Bruce, and Turner, in *Beavan* v. *Lord Oxford*, 25 L. J. Ch. 299, and the Master of the Rolls in *Kinderley* v. *Jervis*, 25 L. J. Ch. 538, holding the contrary doctrine. * * * If it were necessary to decide between this conflict of authority, I should have no hesitation in agreeing with the opinions of Erle, C. J., in *Watts* v. *Porter*, and of the Lord Chancellor, Lords Justices, and Master of the Rolls in the two Chancery cases."

Mr. Justice Willes in the same case, at p. 251, expresses similar opinions.

In the same volume, at p. 264, is the case of *Robinson* v. *Nesbit*, in which the Court of Common Pleas overruled *Watts* v. *Porter*, and decided that a prior equitable assignment of railway shares in the hands of the garnishee, was a bar to an attachment from the mayor's court, London, notwithstanding that no notice of such assignment had been given to the garnishee.

I must hold, then, that the order given by the judgment debtor in favour of Ford and Baker, in February—before the attaching order—operates as an assignment of the fund, though the company had no notice, they not having been led from the want of notice to alter their position, so as to make it inequitable as against them, to enforce the assignment. Of the *bonâ fides* of Ford and Baker's claim, there can be no doubt

It has not escaped me that there is the difference of two cents per tie between the amount payable to Ford and Baker, and the amount payable by the company. But this makes no difference, for the 10 per cent. retainable by the company more than covers the amount.

That 10 per cent. they are willing to pay over upon receiving a release from the judgment debtor, of their contract with him, but at present they are not inbebted in the amount, and therefore cannot be ordered to pay it over.

As to the costs, the judgment creditor should pay the costs of the garnishees, but not the costs of the judgment debtor.

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## Macaulay v. Neville and Macaulay.

*Dower—Infant defendant—Appearance.*

An infant cannot appear by attorney, but by guardian. If the appearance is by attorney, all subsequent proceedings are irregular.

An attorney who appears for an infant, knowing of his infancy, will be ordered to pay the costs of all subsequent proceedings, and of the application to set the same aside.

[Chambers, May 6, 1870—*Mr. Dalton.*]

This was an action of dower, commenced under Stat. Ont. 32 Vic. cap. 7

The writ was issued on the 27th October, 1869, with the usual notice required by that statute, claiming damages for detention of dower.

An appearance was entered for the defendant Macaulay, by attorney, on the 12th November, 1869, with an acknowledgment of title, and his consent that the demandant might have judgment for her dower under sec. 16 of the above act.

Other proceedings were thereupon had; and on the 9th April, 1870, interlocutory judgment was signed for the dower, and a suggestion of the claim for damages filed and served.

On the 19th April the defendant Macaulay pleaded to the suggestion, and on the same day the demandant signed interlocutory judgment, and served notice of assessment, which was immediately returned by the defendant's attorney, with a letter to the demandant's attorney stating that his "judgment is moreover irregular; the defendant, Daniel Macaulay, is an infant, of which I suppose you are aware."

On the 24th day of April, *Osler*, for the defendant Macaulay, obtained a summons calling upon the plaintiff to show cause why (1) the interlocutory judgment of the 9th April should not be set aside because entitled in the Common Pleas, the action being in the Queen's Bench; (2) or why the interlocutory judgment of the 19th should not be set aside on the ground that it was signed after the plea had been filed to the suggestion; (3) or why all proceedings subsequent to the appearance should not be set aside, on the ground that the defendant was and still is an infant, and could not appear by attorney, and no guardian had been appointed to appear for him.

This summons was served upon the regular agents of the demandant's attorney, who on the following day enlarged the same for several days.

On the 25th day of April, *Kerr*, specially instructed in this matter, and without knowledge of the above application or enlargement, on behalf of the demandant, obtained a summons (1) to set aside the appearance and all subsequent proceedings; (2) for an order on the defendant Macaulay to appear by guardian, or, in default of such appearance, that a guardian be assigned to him; and (3) for costs of all proceedings, to be paid by the attorney who had appeared for the defendant.

Both applications came on for argument together.

*Kerr* showed cause to the first summons, and supported the second.

The application on behalf of defendant must fail, as it is not shown that it is made with his consent: *Nunn* v *Curtis*, 4 Dowl. 729. Defendant should go to the root of the irregularity, which was the appearance, and he has not moved against that: Arch. Prac. p. 1463.

This objection was waived by the plea filed by defendant

As to the second objection, the plea filed was inconsistent with the notice filed with the appearance.

After consent under sec. 16, the defendant cannot in any subsequent proceeding deny the demandant's right to dower, and any proceeding denying such right is a nullity. The plea is not an answer to damages, and the right of action is admitted. There remained only an assessment of damages to be made.

The defendant takes advantage of his own wrong, and his attorney admits in the affidavit filed that he knew of the defendant's infancy when he entered the appearance, but to save costs did not have a guardian appointed. He cannot now get costs consequent upon his own irregularity.

The second summons is the proper one, and goes to the root of the irregularity in the appearance, and asks for appointment of guardian; even if appearance be set aside, the order should provide for this: Arch. Prac. 1234; Tidd's Prac. (9th ed ) 97; Park on Dower, 286; *Ross* v. *Cool*, 9 U. C. C. P. 94. And as to costs, the attorney, who is alone responsible, should pay them. He cited *Paget* v. *Thompson*, 3 Bing 609; 11 Moore, 504; *Fountain* v. *McSween*, 4 P. R. 240; *Carr* v. *Cooper*, 1 B. & S 230; *Walker* v. *Dwyer*, 4 Ir. L. Rep. 364; *Keegan* v. *Shaw*, Ir. L. Rep. 2 C. L. 637.

*Osler* supported the first summons, and showed cause to the second.

The second summons must be discharged, because granted after the first had been enlarged, and proceedings thus stayed. The defendant having first moved, is entitled to an order. No improper conduct is imputed to defendant's attorney, and the demandant must have known of the infancy of defendant, who is her step-son. The proceedings are irregular, and must be set aside: *Jarman* v. *Lucas*, 15 C. B. N. S. 474. The suggestion was irregular, the defendant having declared. Section 18 of the act requires this.

Mr. Dalton.—This is a summons by the defendant Macaulay to set aside several specified proceedings, upon grounds of irregularity stated. The only one I think it necessary to notice is that to vacate his appearance in this action, as having been entered by an attorney, and not by his guardian,—and as a consequence to set aside all subsequent proceedings as against him. The summons of the plaintiff is for the same purpose, and for an order on the defendant Macaulay to appear by guardian. But the plaintiff seeks further to charge the attorney for the defendants with all the costs which have been occasioned to the plaintiff by the wrongful entry of appearance by the attorney for the defendant Macaulay.

The summons of the plaintiff was taken out after the summons of the defendant was attendable; and it was urged, upon the argument, that the plaintiff's summons being so attendable, the defendant's summons was necessarily irregular, as having been moved during a stay of proceedings On the argument I supposed that to be so, but I find that it is not.

The defendant's summons did not seek a stay of proceedings, and does not in its nature call for one; for the defendant is not to take the next step, to be dependent on the result of his summons, and the rule in Arch. Ch., 1601, in this respect is clear. I have referred to all the standard works on practice, and I find that they are substantially uniform upon this point.

I have therefore to consider both summonses. The question is really one of costs only, and these are the facts which seem of importance:—

The writ was issued on the 27th October last, and the appearance entered by the attorney on the 12th November. The account given by the attorney of the entry of the appearance is as follows. It is in an affidavit in support of his own summons. He says: "That the defendant, Daniel Macaulay, is, as I am instructed and verily believe, an infant under the age of twenty-one years, but I did not take steps to have a guardian appointed herein for him, with the object of saving expense and trouble, and he, the said defendant, being resident a long distance from the town of Napanee." Other proceedings took place which I will not detail, and finally, on the 19th April, on returning the issue book and notice of assessment delivered by the plaintiff, he adds to other matters in a letter to the plaintiff's attorney: "Your judgment is moreover irregular, because the defendant Daniel Macaulay is an infant, of which I suppose you were aware."

He knew, then, on the 12th November, the fact of Macaulay's infancy; he knew also, as was suggested on the argument, that it was necessary that an infant should appear by guardian, else why should he assign the expense and trouble as reasons for not appointing one? It is to be presumed, as he is a legal practitioner, that he also knew the consequences to the plaintiff of proceeding upon the appearance. Certainly if he knew those consequences on the 19th April, and if he did not contemplate them on the 12th November previous, he does not say at what period between those times he became aware of them. It is observable that he has made no affidavit in answer to the plaintiff's summons, which pointedly seeks to charge him with the costs of the abortive proceedings—where *bona fides* on his part is of material importance to his case—and that when he did give notice on the 19th April, the plaintiff was then necessarily thrown over till the autumn.

On the other hand, the plaintiff and her attorney were neither of them aware of the fact of the infancy of the defendant till the 19th April.

I can draw but one inference from these facts and from what he says and what he does not say—that the attorney *did* know, when he entered the appearance, the effect of that act on the plaintiff's proceedings. Knowing the fact of infancy and the necessity for a guardian, it must at any rate be presumed that he was aware of the direct consequences of entering an ordinary appearance.

There are many English cases, and some in our own Courts, which fully warrant all that the plaintiff here asks. I refer to *Hubbart* v. *Phillips*, 13 M. & W. 702; *Hoskins* v. *Phillips*, 16 L. J. Q B 339; *Goodright* v. *Wright*, 1 Stra. 33; *Carr* v. *Cooper*, 1 B. & S. 232; and to Mansfield's Law of Attorneys, pp 62-5; *Weir* v *Hervey*, 1 U. C. Q. B. 430; *Stephenson* v. *McCombs*, 1 U. C. Q. B. 456. I have not seen any English case exactly in point, but Mr Kerr has referred me to two Irish cases, which are so. In *Lessee of Walker et al.* v. *Dwyer*, 4 Ir. L Rep. 364, it is held that where an attorney enters an appearance and makes defence to an action brought against an infant before a guardian has been appointed for such infant, the court will hold him liable for the costs incurred by the plaintiff in setting aside such defence; and in *Keegan* v. *Show*, Ir. L Rep., 2 C L. 637, under similar circumstances, the defendant's attorney was ordered to pay all costs; and it surely does seem natural and right that where expense has been incurred which must fall upon some one, it should be put upon the party whose wilful default has occasioned it.

I therefore order that the appearance of the defendant Macaulay be set aside, together with all subsequent proceedings in the suit; and that he shall appear by guardian in one week from this time; and that the attorney for the defendants do pay the plaintiff all the costs of the proceedings in this suit since the entry of appearance, and the costs of the plaintiff's present application; and I discharge the defendants' application without costs.

*Order accordingly.*

### McPherson et al. v. McPherson.

*Law Reform Act, 1868, sec. 17—Liquidated amount.*

Under the above section no case can be taken down to a County Court for trial unless the amount is ascertained by the signature of defendant—the words "liquidated" and "ascertained" referring to the same condition.

[Chambers, June 9, 1870.]

The defendant applied to set aside the notice of trial for a County Court on the ground that the case was not one which could be taken down for trial to a County Court under section 17 of the Law Reform Act, 1868.

The particulars of the plaintiff's claim were as follows:

1870. March 10.

| | |
|---|---|
| To 648½ bush. oats delivered here @ 25c | $162 18 |
| To paid freight at your request to Brockville | 23 00 |
| To paid freight on bags from Montreal | 0 52 |
| To paid for time sewing bags | 0 35 |
| | $186 00 |

325 bags delivered F. O. B. here in car No. 757.

There were other similar charges on two subsequent days. No credits were given, nor was the claim ascertained by the signature of the defendant.

*W. S. Smith* shewed cause.

Mr. Muckle (Paterson, Harrison & Paterson) *contra*, cited *Cushman et al.* v *Reid*, 5 Prac. R. 121; 20 U. C. C. P. 152.

Mr. Dalton—The words of section 17 of the Law Reform Act are "liquidated or ascertained by the signature of the defendant."

Upon consideration, I do not think that the words "liquidated" and "ascertained" are intended to convey different ideas, but are a mere redundancy of expression conveying the same idea, and that "by the signature of the defendant" applies to both, they in fact constituting one condition. Such is evidently the view taken by Mr. Justice Gwynne in *Cushman et al* v *Reid*, 20 U. C. C. P. 152, and is the grammatical construction.

It follows that no case can be taken down under clause 17, however clear the nature of the transaction may make the amount of the plaintiff's claim, unless it be ascertained by the signature of the defendant.

## MUNICIPAL CASES.

### Reg. ex rel. Halsted v. Ferris.

*Election—Declaration of qualification—29 & 30 Vic. cap. 51, secs. 131, 178.*

A defective declaration of qualification of a candidate at a municipal election is not a ground for unseating him by the summary process under the Municipal Act.

[Chambers, June 30, 1870.]

It was sought on this application to unseat the defendant on the ground (amongst others) that he had not taken the declaration of qualification required by the statute. The declaration made was as follows:

"I, Matthew Ferris, do solemnly declare that I am a natural born subject of Her Majesty; that I am truly and *bona fide* seized or possessed to my own use and benefit of such an estate, namely: W. ½ Lot 1, in the Gore, 100 acres; M. part Lot 6, 2nd range of Gore, 55 acres, as doth qualify me to act in the office of Reeve for the Township of Colchester, according to the true intent and meaning of the Municipal Laws of Upper Canada."

The objection taken on this point was that the declaration was insufficient, inasmuch as it did not specify the nature of the estate claimed by the declarant, &c.; that the defendant could not, under the statute, enter on his duties until he should have made a proper declaration; and that the election of the candidate was not complete until he had done what was necessary to qualify himself for office: 29 & 30 Vic. cap. 51, sec. 178.

*M. C. Cameron*, Q. C., shewed cause.

*O'Brien, contra.*

Mr. Dalton—Nothing can be made of this objection on this application. Whatever might be the effect of the omission to describe the nature of the claimant's estate in a *quo warranto* at common law, it affords no grounds for declaring, in this statutory proceeding, that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected.

*Judgment for defendant, with costs.*

## ENGLISH REPORTS.

## CROWN CASES RESERVED.

### The Queen v. Kilham.

*False pretences—"Obtaining" goods—Larceny Consolidation Act (24 & 25 Vict. c. 29) s. 88.*

To constitute an obtaining by false pretences there must be an intention to deprive the owner wholly of the property.

The prisoner falsely pretended that he had been sent by A. B. to order and obtain a horse for hire for him. The horse was accordingly delivered to the prisoner, who, after driving it during the day, returned it to the owner in the evening.

*Held*, that the prisoner could not be found guilty of obtaining the horse by false pretences.

[C. C. R., 18 W. R. 957.]

Case stated by the Recorder of the City of York.

James Kilham was tried before me at the last Easter Quarter Sessions for the city of York on an indictment containing three counts, the first count of which was as follows:—"City of York to wit. The jurors for our Lady the Queen upon their oath present that James Kilham, on the 13th day of March, in the year of our Lord, 1870, in the city of York, unlawfully and knowingly, did falsely pretend to Henry Burton, then being an ostler in the service of James Thackray and Edward Thackray, then keeping horses for hire in the city aforesaid, that he the said James Kilham, was then sent by Mr. Hartley (thereby then meaning a son of Mr. Thomas Gibson Hartley, then living in Davygate, in the said city), to order and obtain for hire a horse for him, the said first mentioned Mr. Hartley, to drive on a journey to Elvington, to be ready at half-past nine of the clock the next morning, by means of which said false pretences the said James Kilham did then unlawfully obtain from the said Henry Burton a certain horse of the goods and chattels of the said James Thackray and Edward Thackray with intent thereby them to defraud Whereas, in truth and in fact, the said James Kilham was not then sent by the said Mr. Hartley or any son of the said Mr. Thomas Gibson Hartley, then living in Davygate aforesaid, to order and obtain for hire a horse for him to drive on a journey to Elvington, to be ready at half-past nine of the clock the next morning, as he, the said James Kilham well knew at the time when he did so falsely pretend as aforesaid."

There were two other counts, slightly varied in form but the same in substance. The evidence on the part of the prosecution was that the prisoner had called at the livery stables of Messrs. Thackray, who were duly licensed to let out horses for hire, on the evening of the 13th of March last and stated to the ostler that he was sent by a Mr. Gibson Hartley to order a horse to be ready the next morning for the use of a son of Mr. Gibson Hartley, who was a customer of the Messrs. Thackray. Accordingly, the next morning the prisoner called for the horse, which was delivered to him by the ostler. The prisoner was seen in the course of the same day driving the horse, which he returned to Messrs. Thackray's stables in the evening. The hire for the horse, amounting to seven shillings, was never paid by the prisoner. Mr. Hartley and his son denied that they had authorised the prisoner to hire any horse for them, or that the prisoner had used the horse for any purpose of theirs. The prisoner was found guilty, but I respited the sentence and admitted him to bail till the opinion of the Court for Crown Cases Reserved could be taken. I desire the opinion of the Court as to whether the prisoner could properly be found guilty of obtaining a chattel by false pretences within the meaning of the statute 24 & 25 Vict. c. 96, s. 88. The case of *Reg* v. *Boulton*, 1 Denison's Crown Cases, 508, was relied on on the part of the prosecution.

Edwin Plumer Price, Recorder.

April 19, 1870.

May 7.—No counsel appeared for the prisoner.

*A Simpson*, for the prosecution. Obtaining money by way of loan by a false pretence has been held to be within the former statute, 7 & 8 Geo. 4, c 29, s. 53; *Reg.* v. *Crossley* 2, Moo. & R. 17, Patteson, J., laying it down that the terms of that Act embrace every mode of obtaining money by false pretences, by loan as well as by transfer. *Reg.* v. *Boulton* (1 Den C. C. 508), is very like the present case. There the prisoner obtained by a false pretence a railway ticket for a journey from Bendford to Huddersfield, which would have had to be given up at the end of the journey; though in fact the prisoner was stopped on the line and the ticket taken from him. What the prisoner obtained there was the use only of the ticket for the time during which the journey would last; and it appears from the judgment, which was a considered one, that the fact that the ticket was to be returned was present to the mind of the Court. The learned editor of Russell on Crimes (vol. 2, p. 645, note *p.*) questions that decision, and puts the very case now before the Court as on the same footing with it. In that he is right, but it is submitted that the case cannot now be questioned, and is binding on the Court. This Court has already, in *Morrison's case*, 7 W. R. 554, Bell, 158, 167, held itself bound by *Reg.* v. *Boulton*. The statutes relating to false pretences were originally passed to avoid the difficulty which existed of convicting of larceny any person who had obtained the property in the goods by fraud, and "they were not intended to mitigate the common law:" 2 East, P. C. 689. The first statute was 33 Hen. 7, c. 1, and was confined to the case of obtaining goods by false tokens, and that was extended by 30 Geo. 2, c.3, to all cases where goods were obtained by false pretences of any kind. [Willes, J.—The words in the preamble of 33 Hen. 8, c. 1, are "get into their hands or possession." The note to 2 East, P. C. 689, goes to show that that was not meant to apply to a case of obtaining the use only, but rather to cases where actual possession was obtained.]

*Per* Curiam.—The question raised by this case is a very important one, and the rule to be laid down will be one of general application. The Court is much indebted to the learned counsel for the prosecution for his able argument, and will take time to consider its judgment.

*Cur. adv. vult.*

June 4.—The judgment of the Court was now delivered by

Bovill, C.J.—We are of opinion that the conviction in this case cannot be supported. The statute 24 & 25 Vict. c. 96, s. 88, enacts that, "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of misdemeanour." The word "obtain" in this section does not mean obtain the loan of, but obtain the property in any chattel, &c. This is to some extent indicated by the proviso, that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted; but it is made more clear by referring to the earlier statute from which the language of section 88 is adopted. The 7 & 8 Geo 4, c. 89, recites that "a failure of justice frequently arises from the subtle distinction between larceny and fraud," and for remedy thereof enacts that if any person shall by any false pretence, obtain, &c. The subtle distinction which the statute was intended to remedy was this, that if a person by fraud induced another to part with the possession only of goods, and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny. But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. In support of the conviction the case of *Reg* v. *Boulton*, 1 Den, C. C. 508, 19 L. J. M. C. 67, was referred to. There the prisoner was indicted for obtaining by false pretence a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect that the prisoner by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied. In this case the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time. The conviction must, therefore, be quashed.

*Conviction quashed.*

## EXCHEQUER CHAMBER.

### Jacobs v. Sheward

*Tenants in common—Trespass by one against the other.*

Trespass will not lie by one tenant in common against another for cutting and carrying away a crop of hay, the whole produce of the common property.

[18 W. R. 953.]

Appeal from a decision of the court of Common Pleas, making absolute a rule to enter a nonsuit in an action of trover and trespass, brought by one tenant in common of land against the other, for cutting and selling the hay on the land, being the whole produce thereof, without his permission. The case in the court below is fully reported in 17 W. R 735.

Brett, J., refused to nonsuit at the trial, on the authorify of *Benington* v. *Benington*, Cro. Eliz. 157, which was cited to him from Roscoe on Evidence, 11th ed. 567, where it is wrongly quoted as deciding that the plaintiff was entitled to judgment, whereas it really decided that the defendant was entitled to judgment.

*Gibbons* argued for the plaintiff, and cited *Henderson* v. *Eason*, 17 Q B. 701, and *Murray* v *Hall* 7 C B 441; but the court, without calling on *Bulwer*, Q C, who appeared for the defendant, affirmed the decision of the court below.

*Decision affirmed.*

## CHANCERY.

### Lambe v. Eames.

*Will—Construction—Gift absolute or coupled with trust.*

A testator gave real and personal property to his wife "to be at her disposal in any way she may think best for the benefit of her and her family."

*Held*, that there was no trust created, but that the wife took the property absolutely.

[Chan. 18 W. R. 972.]

John Lambe, by his will made in 1833, willed and bequeathed to his wife Elizabeth Lambe, his freehold estate, being No. 29, Cockspur-street, and also his personal estate "to be at her own disposal in any way she may think best for the benefit of herself and family." Elizabeth Lambe died in 1865, having by her will, dated in 1857, devised the freehold house to trustees in trust for her daughter, charged with an annuity of £70 to the plaintiff, who was an illegitimate son of one of her sons, and after her daughter's death in trust for the plaintiff and another grandchild, and after the death of either for the survivor.

The bill was filed for (amongst other things) compelling payment of the annuity which had never been paid, and the question raised was whether Elizabeth Lambe took an absolute interest in the property under the will of her husband so as to enable her to dispose of it as she chose, or whether she only took a life interest subject to a trust for her family.

*Cotton*, Q C., and *Warner*, for the plaintiff, contended that although this was a will made under the old law, yet there was an absolute gift with sufficient words to pass the absolute interest in the fee. It was impossible to say there was a trust for the family where the words said she might do what was best for herself. They cited *Brook* v. *Brook*, 3 Sm. & G 280; *Reeves* v. *Baker*, 2 W. R. 354, 18 Beav. 372; *Howorth* v. *Dewell*, 9 W. R. 27, 29 Beav. 18; *Grey* v. *Pearson*, 5 W. R. 454, 6 H. of L. Cas. 61; *Knight* v. *Knight*, 3 Beav. 148; *Williams* v. *Williams*, 1 Sim N. S. 358; *Green* v. *Marsden*, 1 W. R. 511, 1 Dr. 646; *Alexander* v *Alexander*, 5 W. R. 28, 2 Jur. N. S. 898, 6 DeG. M & G. 593; *Webb* v. *Wools*, 2 Sim. N. S. 267, Sugden on Powers, 8th ed. p. 590.

*Bristowe*, Q C., and *W. Barber*, for the defendants, contended that there was an absolute indelible trust. The property was given to Mrs. Lambe for a definite, distinct and fixed purpose, namely, to be at her disposal for the benefit of herself and other persons. In the cases relied on on the other side there was first an absolute gift and then a precatory trust added. Here there was no precatory trust, but an imperative one. Had she sold the property during her lifetime though quite able to make a title as far as a purchaser was concerned, yet she would be a trustee of the proceeds as between herself and her family. They citied *Butler* v. *Gray*, 18 W. R. 193, L R 5 Ch. 26; *Shovelton* v *Shovelton*, 32 Beav. 143; *Salusbury* v. *Denton*, 5 W R. 865, 3 K. & J. 529; *Crockett* v. *Crockett*, 2 Ph. 553; *Woods* v. *Woods*, 1 My. & Cr. 401; *Raikes* v. *Ward*, 1 Ha. 445: *Armstrong* v. *Armstrong*, 17 W. R 570, L. R. 7 Eq. 518; *Scott* v. *Key*, 13 W. R. 1030, 35 Beav. 291; *Godfrey* v. *Godfrey*, 11 W. R. 754; *Smith* v. *Smith*, 2 Jur. N. S 965; Hawkins on Wills, p. 165; Jarman on Wills, 3rd ed. p. 359.

*Heath*, for one of the devisees under Mrs. Lambe's will.

*Cotton*. Q. C., in reply.

Malins V. C., after stating the will, said that if the widow had sold the house it had been admitted by the counsel for the defence that her title could not have been disputed. The testator did not say *my* family, it might mean *her* family, and if so it would include children by a future husband. The testator evidently intended his wife to do what she liked with the property, and he had no doubt it was his intention to leave it at her absolute disposal. The tendency of the cases was not to fetter these kinds of gifts In the cases cited there were words stronger than these, and yet they had been held not to create a trust. There was no indication here of an intention on the part of the testator that the family should take anything except through the voluntary appointment of their mother. He apprehended that where there was an absolute gift at first, the latter part must show as clear an intention to cut down the absolute gift as the first part did to give one. He was of opinion, therefore, that the testator's widow took the fee simple of the real property, and the personalty absolutely.

## DIGEST.

### DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE AND JULY, 1870.

*(Continued from page 251.)*

Abandonment—*See* Insurance, 4.

Action.

1. A debtor gave a fraudulent preference to the defendant, one of his creditors, by assigning goods to him, and was afterwards adjudicated a bankrupt; before the adjudication the defendant sold the goods. The assignee brought this action to recover the money received for the goods. *Held*, reversing the judgment of Q. B., that the assignee of a bankrupt might avoid a fraudulent preference, because it contravenes the spirit of the bankruptcy laws; and that, the goods having been converted into money, he might maintain an action for money had and received, to recover the proceeds. (Exch. Ch.)—*Marks* v. *Feldman*, L. R. 5 Q B. 275.

2. W.'s stock was to be sold at auction; he was indebted to the defendant, and it was agreed between them that the defendant should buy at the sale, and place the amount against W.'s debt The defendant bought at the sale and received the goods; the plaintiff, who was the auctioneer, was ignorant of the agreement until he had paid over to W. about half the proceeds of the sale; he then had notice of it from the defendant. Afterwards the plaintiff paid to W. the balance due, deducting his commission. *Held*, that as the plaintiff's charges had been satisfied by W., and as W was not entitled to receive any thing, the plaintiff could not maintain an action for the price of the goods against the defendant.—*Grice* v. *Kenrick*, L. R. 5 Q. B. 340.

*See* Principal and Agent, 2; Warranty.

Administrator Pendente Lite.

Testator left a will and two codicils. There was no opposition to the will and first codicil, but the defendant opposed the second codicil; this codicil did not affect the appointment of executors. The court refused to appoint an administrator *pendente lite*, as there was an executor capable of discharging his functions. —*Mortimer* v. *Paull*, L. R. 2 P. & D. 85.

Admiralty.—*See* Collision; Towage.

Admissions.

At the trial of an action by the plaintiff and wife for injuries to the wife owing to the defendants' negligence, evidence was given by the defendants tending to show that the plaintiff offered a man one-third of the compensation received, if he would give false evidence in his behalf, and that C., a clerk of the plaintiff's attorney, who was present, said that if he did not do it, he would find others who would. Two other witnesses testified that C. made similar proposals to them to give false evidence, but that these proposals were not made in the plaintiff's presence. *Held*, that the evidence was admissible as admissions by the plaintiff that his case was not a good one, and that there was evidence that C. acted by the plaintiff's authority. —*Moriarty* v. *London, Chatham and Dover Railway Co.*, L. R. 5 Q. B. 314.

Adultery—*See* Evidence, 2, 4.

Agency—*See* Principal and Agent.

Ambiguity.

Devise "to my nephew Joseph Grant." It appeared that the testator's own brother had a son Joseph Grant; and that the testator's brother-in-law had a son Joseph Grant, whom the testator was in the habit of calling his nephew. *Held*, that the evidence exposed a latent ambiguity, and that parol evidence was admissible to show which person was intended. —*Grant* v. *Grant*, L R. 5 C. P. 380.

*See* Evidence, 1; Will.

Ancient Light.

The owner of land subject to an easement of light has no right to deprive the dominant estate of any of the light coming to it, because the owner of the dominant estate has by any means obtained other light besides that which he had by his easement.—*Dyers' Company* v. *King*, L. R. 9 Eq. 438.

Appointment.

1. A marriage settlement, after declaring certain trusts, directed that the trustees shoul

hold the residue in trust for such persons as the wife should appoint, and contained limitations in default of appointment. The wife appointed that the trust funds should be paid to two trustees for the benefit of her two nieces. One of these nieces died before the wife, and her interest in the fund lapsed. *Held*, that the appointment to trustees was a severance of the property from the settlement fund, and that the lapsed interest passed to the next of kin of the wife, and not under the limitations in the settlement.—*Wilkinson* v. *Sckneider*, L. R. 9 Eq 423.

2. C. by his will appointed a leasehold estate, after his wife's death, for the same purposes as his wife should declare, "with respect to the disposition of her residuary personal estate," by will; and in default of any disposition by her of her residuary personal esttae, or so far as the same should not extend, to his next of kin. His wife by will gave certain legacies, and then gave "all the residue of her property," one-third to a hospital, and the remaining two-thirds to charities which were incompetent to receive the bequest. *Held*, that the hospital took one-third of the husband's leasehold estate, and the other two-thirds went to his next of kin.—*Bristow* v. *Skirrow*, L. R. 10 Eq. 1.

3. Real estate was settled upon a husband and wife for their lives, remainder to such of their children as they should appoint by deed; there was no power to grant building leases. There were four children of the marriage, and the husband and wife by deed appointed the whole estate to one in fee; afterwards they and the appointee conveyed it to trustees upon similar trusts to those contained in the settlement, and also with power to grant building leases. *Held*, that the appointment was for the benefit of all the persons interested in the power as well as the appointors, and therefore was not fraudulent.—*In re Huish's Charity*, L. R. 10 Eq 5.

*See* Election

Appropriation.

The New Orleans Bank drew a bill for £2,000 upon the Bank of Liverpool in favor of the plaintiffs, who bought it on the faith of representations by the New Orleans Bank that funds to meet it were lying in the Bank of Liverpool specifically appropriated to that purpose. Before acceptance the New Orleans Bank suspended payment. Upon a bill against both Banks, *held*, that the plaintiffs having purchased the bill on the faith of those representations, were entitled to be paid the amount out of the funds of the New Orleans Bank in the hands of the Bank of Liverpool.—*Thomson* v. *Simpson*, L. R. 9 Eq. 497.

*See* Trust.

Assault—*See* Indictment.

Assignment.

A bank agreed to renew two notes of a company upon the understanding that a call should be made and the proceeds deposited with the bank to await the maturity of the notes. The notes were renewed, and the call made. *Held*, that the assignment of the call already determined on, could not be distinguished from the case of a mortgage of the arrears of a call already made, and was valid.—*In re Sankey Brook Coal Co*, L. R. 9 Eq. 721.

Assumpsit—*See* Action, 1; Warranty.

Auctioneer—*See* Action, 2.

Bailment—*See* Insurance, 1.

Bankruptcy—*See* Action, 1.

Bill of Lading.

Goods consigned to a firm in London were landed at a sufferance wharf subject to a lien for freight. (11 & 12 Vict. c. 18.) The consignee deposited with M., the plaintiff, the first and second parts of the bill of lading as security for £2,500, but fraudulently retained the third part B., the defendant, without knowledge of these transactions, advanced £2,000 on receiving the third part of the bill of lading, and the lien for freight being removed, obtained the goods and sold them. The Act (11 & 12 Vict. c. 18) provides that goods landed at a sufferance wharf shall, upon notice to the wharfinger, remain subject to the same lien for freight as if they remained on board the ship. *Held*, that the goods were not delivered while they remained subject to the lien for freight, and that the bill of lading continued in force; also that the first transfer of the bill of lading to M. passed to him the ownership of the goods.—*Barber* v. *Meyerstein*. L. R. 4 H. L. 317.

Bills and Notes.

D. P. bought certain overdue bills of exchange for £2,800. Of the purchase-money £2,000 were assets of the Oriental Bank, and had been collected by D. P., who was manager of the bank. He afterwards sold these bills to the Eastern Bank, of which he was managing director, and paid himself for them out of its funds. The Oriental Bank claimed the bills. *Held*, that the Eastern Bank was not affected with notice of the fraud through its director D. P., but that, as the bills were overdue, the Eastern Bank took no better title than D. P., and the Oriental Bank was entitled to a part of the proceeds of the bills proportionate to its share of the purchase money.—*In re European Bank. Ex parte Oriental Commercial Bank*, L. R. 5 Ch. 358.

*See* APPROPRIATION: ASSIGNMENT.

BOND—*See* RACING DEBT.

BOTTOMRY—*See* INSURANCE, 3.

BUILDING RESTRICTIONS—*See* INJUNCTION.

BURDEN OF PROOF.

The plaintiff demised a dwelling-house to A., who covenanted in the lease that he would not permit any sale by public auction to take place on the premises without the consent in writing of the plaintiff; and there was a proviso for re-entry in case of breach of covenant. A. underlet to the defendant, and assigned his goods upon the premises to B., C., and D., who sold them by public auction on the premises, bills having been previously posted there. In an ejectment for forfeiture, upon the above facts, *held*, that the plaintiff should be nonsuited [by Kelly, C. B., Martin and Pigott, BB.] on the ground that there was no evidence that the sale was by the permission of the lessee; by Willes, J., on the ground that being the case of a forfeiture, the burden was on the plaintiff of showing that the sale was without the consent of the plaintiff; by Brett, J., Channel and Cleasby, BB., on both grounds. (Exch. Ch.)—*Toleman* v. *Portbury*, L. R 5 Q. B. 288.

BURIAL GROUND—*See* REVERTER.

CALL—*See* ASSIGNMENT.

CHARGE.

In 1802, there were two judgments (for £1,000 and £2,000) against A. In 1809, A. made a voluntary settlement of his real estate, reserving to himself a life interest, in which it was recited that said estates were subject to these charges, amounting in the whole to £3,000. In 1818 and 1819, he executed two mortgages on his real estate. The judgment of 1802 for £2,000 was paid out of A.'s life estate under the settlement. At the suit of a judgment creditor in 1822, a receiver was appointed, and part of the land sold and applied to his debt. A. died in 1861. The petitioner was a judgment creditor. *Held*, that the judgments of 1802 were charges on the inheritance, and that so much of them as had been paid out of the life estate ought to be paid by the inheritance for the benefit of the creditors whose demands affected only the life estate; also that the statute of Elizabeth against fraudulent conveyances enabled A. to defeat the voluntary settlement so far as the mortgages extended, but that the doctrine of marshalling did not apply.—*Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

CHARITY—*See* CY PRES.

CLASS.

Two marriage settlements were made; by one, the real estate of the husband, subject to certain life estates, was settled upon the first and other sons of the marriage successively in tail male; by the other, which recited the first, the wife's real estate was settled, subject to a life interest for her, to the use of all the sons (except the eldest or only son) and daughters of the marriage, as tenants in common. in tail; and if any such son or daughter should die without issue, or if any such son should become an eldest son before he should attain the age of twenty-one, then as to the share of such son or daughter to the use of the survivors as tenants in common in tail. After the husband's death, his eldest son entered into possession of his estate and died; the next son succeeded to the husband's estate, having attained twenty-one, and died leaving a son: two daughters of the marriage survived. Upon the wife's death, it was *held*, that the class entitled to the wife's estate was to be ascertained at her death, which was the time of distribution; and that the two daughters were the only ones entitled to a share.—*In re Bayley's Settlement*, L. R. 9 Eq. 491.

CODICIL.

1. A testator, having made a will and codicil, executed in the presence of two witnesses a document to the following effect: "I hereby make a free gift to Maria Robertson of sixty pounds." The court, being satisfied by parol evidence that the testator intended the gift to be dependent on his death, granted probate of the paper as a codicil to the will.—*Robertson* v. *Smith*, L. R. 2 P. & D. 43.

2. A testatrix by her will gave a legacy to her niece M.; by a codicil she revoked the bequest, and gave it to her two nieces equally; by another codicil she declared, "My wish is, that in the event of the name of M. having been erased from my will, it be reinstated as previously there placed." *Held*, that the erasure of the name of M. never having been made, the last codicil was inoperative.—*Wilkinson* v. *Schneider*, L. R. 9 Eq. 423.

COLLISION.

Two vessels were close hauled on the same tack, one ahead of the other. The head vessel went as near a shoal as she could and went about; as she was coming round, the other vessel ran into her. *Held*, that it was the duty of the rear vessel to go about when she saw the other go about, and as she had not done so, she alone was to blame for the collision.—*The Priscilla*, L. R. 3 Ad. & Ecc. 125.

*See* Towage.

Collusion—*See* Waste.

Commitment.

The prisoner was convicted under 5 Geo. IV. c. 83, s. 4, which enacts, that every suspected person or reputed thief frequenting . . . any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony . . . . . shall be deemed a rogue and vagabond. The warrant of commitment stated that he had been convicted of frequenting "a certain highway at," &c., "with intent to commit a felony." The prisoner was brought up upon *habeas corpus*. *Held*, that a public highway is not necessarily a place of public resort, and that the commitment was bad.—*In re Timson*, L. R. 5 Ex. 257.

Company.

The articles of association of a company provided that, when 3000 shares should have been subscribed for, the members should be associated for the objects of the company. Before 3000 shares were subscribed for, the plaintiff was appointed engineer by the directors. In an action for his salary, *held*, that until 3000 shares were subscribed for, there was no company capable of contracting with the plaintiff.—*Pierce* v. *Jersey Water Works Co.*, L. R. 5 Ex. 209.

*See* Assignment; Director; Principal and Agent, 4; Ultra Vires.

Confirmation.

1. Bill to set aside a settlement. The plaintiff made a settlement with a power to raise a jointure for his future wife, and to raise portions for his children. By the settlement made upon his marriage, he exercised these powers; ten years afterwards he filed a bill to set aside the former settlement, alleging that he executed it in ignorance of its purport. *Held*, that, although the court would have otherwise directed it to be set aside, yet the exercise of the power of jointuring, given by it, was a confirmation of the whole transaction, and the bill was dismissed.—*Jarratt* v. *Aldam*, L. R. 9 Eq. 463.

2. A female infant executed a marriage settlement of her share in reversion of two estates. After her husband's death, and after she had attained full age, one of the estates fell into possession, and she directed it to be paid to the trustees under the marriage settlement. The other estate afterwards fell into possession. *Held*, that she had confirmed the settlement in part, and must be taken to have intended to confirm the whole of it.—*Davies* v. *Davies*, L. R. 9 Eq. 468.

Construction.

1. The plaintiffs agreed to ship a quantity of ice to the United Kingdom, "forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation, of whatever nature or kind soever," and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery. *Held*, that the clause by which the defendant took upon himself the risks of the seas exonerated the plaintiffs from liability for non-delivery in case of loss, but did not render the defendant liable to pay for the ice in that case. (Cleasby, B., dissenting.)—*Castle* v. *Playford*, L. R. 5 Ex. 165.

2. By 1 & 2 Wm. IV. c. 82, s. 8, "if any person whatsoever shall kill or take any game, or use any dog, gun, net, or other engine or instrument, for the purpose of killing or taking game on a Sunday, or a Christmas Day," he shall be liable to a penalty on conviction. The appellant set snares on Saturday, and on Sunday some of the snares were seen set, and in two of them were two dead grouse. *Held*, that a snare was an engine within the meaning of the statute, and that setting the snares on Saturday and leaving them set on Sunday was using them on a Sunday.—*Allen* v. *Thompson*, L. R. 5 Q. B. 336.

3. A testator, by a will executed before the Wills Act (1 Vict. c. 26), gave to his son George (without words of limitation) certain real and personal property, charged with a payment of £100; and provided that, if George should die before his wife, she should have the use of "the above my property and estate" for life, after whose decease he gave the same to the five children of his son William, share and share alike, with survivorship in case of the death of any of them before the estate became vacant. *Held*, that George took only an estate for life, and that the grandchildren took vested remainders as tenants in common after the life estates of George and his wife.—*Bolton* v. *Bolton*, L. R. 5 Ex. 145.

4. A testator bequeathed £250 to each of the two children of S. S. had three children and the testator knew it. The executors paid the child who was of age; and appropriated £250 for the second, and paid the residue to the residuary legatee. *Held*, that the three children were each entitled to £250, which,

with the costs of the executors, must be paid by the residuary legatee.—*Spencer* v. *Ward*, L. R. 9 Eq. 507.

5. A testatrix gave an annuity of £40 to I. in a certain contingency; she also bequeathed to I. a legacy of £30. In a codicil she said, "And I increase the immediate annuity of £30, left by my will to I., to an annuity of £50." *Held*, that I. took an annuity of £50, instead of the legacy of £30.—*Ives* v. *Dodgson*, L. R. 9 Eq. 401.

6. A testator devised to trustees, upon trust to permit his brother-in-law, H. M., and all his brothers and sisters, to enjoy the rents and profits, in equal shares for their lives, with benefit of survivorship where any of them died without leaving children; but where any of them died leaving children, then upon trust to let such children have their parents' share of the rents and profits. One brother of the testator died before the date of the will, leaving children; H. M., and one sister and one brother, died after the date of the will and before the death of the testator, all leaving children; five brothers and one sister survived the testator. *Held*, that the children of H. M. and the brother and sister who were living at the date of the will, were entitled to shares in the rents and profits, but that the children of the brother who died before the date of the will were excluded.—*Habergham* v. *Ridehalgh*, L. R. 9 Eq 395.

7. A testator bequeathed to trustees all his personal estate, "save and except the sum of £500 payable at my death, under a policy of insurance, to my wife Hannah Hall, and to which she is absolutely entitled under the said policy." The only policy of insurance possessed by the testator was payable to himself and his representatives; his wife had no interest in it. *Held*, that the £500 payable under the policy was given by implication to the wife.—*Hall* v. *Leitch*, L. R. 9 Eq. 376.

8. A bequest of "one-fifth part of my residuary estate unto each of my two sons James Clark and Charles Clark absolutely, and to be paid and transferred to them respectively or to such of them as shall be living at the time of the decease of my said wife," is equivalent to a bequest of two-fifths to the two sons equally, or to such as shall be living at the death of the wife; and Charles Clark having died without issue in her lifetime, James Clark was held to be entitled to the two-fifths upon her decease.—*In re Clark's Trust*, L. R. 9 Eq. 378.

9. In 1811 the Duchess of Buccleugh made a settlement of the Cardigan family plate upon trust for Robert, Earl of Cardigan, during his life, and after his decease for James Thomas, Lord Brudenell, only son and heir apparent of said Robert, during his life, and after his decease for the first son of said James Thomas, Lord Brudenell; provided, that if such first son should die under twenty-one, without leaving issue male living at his decease, then in trust for the other sons of said James Thomas, Lord Brudenell, successively; but if said James Thomas, Lord Brudenell, should have no sons, or all should die under twenty-one, without issue male living at their decease, then in trust for the other sons of Robert, Earl of Cardigan, successively; and if there should not be any son of said Robert, Earl of Cardigan, or of the said James Thomas, Lord Brudenell, who should live to attain twenty-one, or should die under that age leaving issue male living at his death, then in trust for said Duchess of Buccleugh, her executors, &c. The only son of Robert, Earl of Cardigan, was James Thomas, Lord Brudenell, who attained twenty-one, and died without issue. *Held*, that the failure of sons of Robert, Earl of Cardigan, mentioned in the settlement, meant the failure of such sons as were before mentioned, and that upon the death of James Thomas, Lord Brudenell, without issue, the limitation to the Duchess of Buccleugh took effect.—*Cardigan* v. *Curzon-Howe*, L. R. 9 Eq. 358.

*See* Class; Commitment; Covenant; Cy Pres; Devise; False Pretences; Forgery; Investment; Settlement, 2; Specific Performance, 2; Will, 1-4.

Contract.

1. The defendant ordered of the plaintiffs "a small cargo" of lathwood, "in all about sixty cubic fathoms," and the plaintiffs accepted the order. The plaintiffs chartered a vessel and loaded her for the defendant's port with eighty-three fathoms of lathwood; on her arrival the plaintiffs' agent set apart the amount of the defendant's order, but the defendant would not accept it. In an action for non-acceptance, *held* (Martin, B., dissenting), that the word "cargo" meant the whole loading of the ship, and that therefore the plaintiffs had not completed the defendant's order.—*Kreuger* v. *Blanck*, L. R. 5 Ex. 179.

2. A building contract provided that the work should be completed by Oct. 2, 1868, but that if by certain contingencies the contractor should in the opinion of the architect have been unduly delayed, it should be lawful for the

architect to grant such extension of time as to him might seem reasonable; and that it should be lawful for the commissioners, in case the contractor (among other things) should not "in the opinion and according to the determination of the architect exercise due diligence and make such due progress as would enable the works to be efficiently completed at the time aforesaid," to determine the contract by a notice in writing. In an action by the contractor against the commissioners for preventing him from completing the contract, they pleaded that he did not in the opinion and according to the determination of the architect exercise due diligence, &c., and thereupon they gave the notice provided to determine the contract. The plaintiff replied that the architect did not grant an extension of time, and that the alleged failure to exercise due diligence, &c., was caused by the default of the defendants and the architect in certain particulars. Upon demurrer, *held*, reversing judgment of C. P., that the contract did not give the architect power to determine whether the failure of the plaintiff was caused by the default of the defendants, and therefore that the defendants could not avail themselves of their own wrong to determine the contract. (Cleasby and Pigott, BB., dissenting.) (Exch. Ch.)—*Roberts* v. *Bury Improvement Commissioners*, L. R. 5 C. P. 810; s. c. L. R. 4 C. P. 755; 4 Am. Law. Rev. 465, 466.

*See* Company; Construction, 1; Covenant; Guaranty; Principal and Agent, 2, 8; Racing Debt.

Contributory—*See* Principal and Agent, 4.

Conveyance—*See* Title.

Covenant.

1. The plaintiff purchased a piece of land of A, who covenanted that "no buildings except dwelling-houses," not to be of a less cost than £200 each, should be erected on the side of the road opposite to the plaintiff's land. The defendant, Law, agreed afterwards to purchase of A. the land on the opposite side of the road, and agreed to make a permanent fence around the premises purchased, either by railing or walling from four to seven feet high. A.'s agreement with the plaintiff was also recited, and the defendant entered into a similar covenant with A. The defendant raised a boundary wall eight feet six inches high, and in one place eleven feet high, for the purpose of making a vinery on the inner side with a lean-to roof against the wall. *Held*, that the erection of a boundary wall was no breach of covenant, but that the raising of the wall and placing a vinery against it were so. Also that A. was not a necessary party.—*Bowes* v. *Law*, L. R. 9 Eq. 636.

2. Covenant that a piece of land should not be used as a site for a hotel, tavern, public-house, or beer-house, nor should the trade or calling of an hotel or tavern keeper, publican, or beer-shop keeper, or seller by retail of wine, spirits, or spirituous liquors, be used, exercised, or carried on, at or upon the same. The defendant sold on the premises wine and spirits in bottles only, in connection with the trade of a grocer, *Held*, that the covenant was directed against a bar, and not against the trade of a wine merchant, and that there was no breach.—*Jones* v. *Bone*, L. R. 9 Eq. 674.

*See* Injunction; Specific Performance, 2.

Criminal Law.

Indictment for obstructing a train on a railway. The prisoner unlawfully altered the signals at a railway station. A train, which would have passed without slacking speed, was caused by the alteration to come very nearly to a stand. *Held* (Martin, B., dissenting), that this was an obstruction.—*Regina* v. *Hadfield*, L. R. 1 C. C. 253.

*See* Commitment; False Pretences.

Cruelty—*See* Husband and Wife, 2.

Cy Pres.

Bequest of £300 to the Church Pastoral Aid Society in England, and £200 to the Church Pastoral Aid Society in Ireland; there was no society of that name in Ireland, but the Spiritual Aid Society had objects similar to those of the C. P. A. Society in England, *i. e.*, pastoral aid. *Held*, that there was a clear intention to effect a particular object of charity, which would be carried out by the Spiritual Aid Society, and the legacy of £200 was ordered to be paid to them.—*In re Maguire*, L. R. 9 Eq. 632.

Damages.

The defendant represented to the plaintiff that he had authority to sell the L. estate, which was owned by himself and four others, and the plaintiff made a written offer to buy it for a certain sum. The defendant answered by telegraph, "Your offer for the L. estate is accepted." The other owners afterwards denied the defendant's authority, and sold the estate to another person at a higher price. The plaintiff then brought an action against all the owners for breach of contract; in answer to interrogatories, the joint-owners all swore that the defendant had no authority to make the contract, but the plaintiff proceeded with his action and was nonsuited. He had also purchased stock for the estate. In an action upon the implied warranty of the defendant, *held*, that the telegram written out by the telegraph clerk, with the authority of the defendant, was a sufficient memorandum within the Statute of Frauds; *held, also*, that the plaintiff was entitled to recover the expense of investigating the title, the damages occasioned by the loss of bargain, and the costs of the former action up to the time when the answers of the joint-owners were submitted to counsel; but that he could not recover for the loss occasioned by the purchase of stock.—*Godwin* v. *Francis*, L. R. 5 C. P. 295.

Dedication—*See* Reverter.

Delivery—*See* Bill of Lading.

Devise.

By a will made before the Wills Act, the testator devised all his real estate to his two brothers and the survivor for their lives, and after their decease unto all the children of his said brothers who should then be living, equally share and share alike: and in case of the death of any of them in the lifetime of either or both of his brothers leaving lawful issue living, then he devised the part or share of such deceased parent unto and equally among all his children who should then be living. The residue of his real and personal estate he gave to his wife and her heirs. *Held*, that the general devise to the children of the brothers was enlarged to a fee by the devise over to the children of such parents as should die before the specified time, and that the brother's children ond grandchildren took estate in fee-simple.—*In re Harrison's Estate*, L. R. 5 Ch. 408.

*See* Ambiguity; Construction, 3, 6; Residuary Clause; Will, 2.

Directors.

L. obtained the consent of the directors of the Estates Bank to an amalgamation with the plaintiff bank, upon payment of a compensation of £6000 to the managers, and certain smaller sums to the chairman, vice-chairman, and other directors. L. then induced the directors of the plaintiff bank to make an agreement with the Estates Bank for their amalgamation, and to promise him a commission of five per cent. on the capital of the Estates Bank. The agreement was carried into effect, and the manager, chairman, and vice-chairman became directors in the plaintiff bank, and received from L. the compensation agreed upon, L. having been paid the commission of five per cent. which had been promised him. In a suit against the directors of the plaintiff bank to recover the money paid to L. and the officers of the Estates Bank, *held*, that the chairman and vice-chairman of the Estates Bank were not justified in receiving the money, and must refund the sums which had been paid them; that the manager must refund all except so much as would be proper compensation for the loss of his office of manager; that the other directors had not acted improperly, and were not liable to repay any thing.—*General Exchange Bank* v. *Horner*, L. R. 9 Eq. 480.

Discovery.

By an indenture of settlement certain estates were conveyed to such uses as the settlors should jointly appoint, and in default of appointment to the settlors for life, with remainders to other persons. By virtue of the power the settlors mortgaged the estates. In a suit to redeem by one of the remainder-men, the mortgagees having admitted that the plaintiff was entitled to redeem, it was *held*, that the plaintiff could not claim the production of the deed of settlement without paying the mortgage debt.—*Chichester* v. *Marquis of Donegal*, L. R. 5 Ch. 497.

Dismissal—*See* Notice, 1.

Divorce—*See* Evidence, 2; Husband and Wife, 2.

Easement—*See* Ancient Light.

Election.

A woman on her marriage appointed £3000 by deed to trustees in trust for her husband for life, and at his decease to divide equally among her nephews, reserving power to revoke the trust in favor of her nephews. By her will she revoked all the trusts in the deed, and appointed £1000 to her husband and £2000 to the plaintiff. *Held*, that the husband must elect between the legacy and the life-interest. —*Coutts* v. *Acworth*, L. R. 9 Eq. 519.

Equity—*See* Bills and Notes; Confirmation, 1; Specific Performance, 2.

Equity Pleading and Practice.

1. If a plaintiff has not sufficient title to maintain a suit when he files his bill, he cannot maintain it upon a title subsequently acquired. —*Evans* v. *Bagshaw*, L. R. 5 Ch. 340.

2. Bill to charge a legacy upon real estate; the defendant alleged that he purchased it for a valuable consideration without notice. During the negotiations for the purchase by the defendant, certain letters relating to the plaintiff's claim, passed between the defendant's solicitor and the agents of the vendor. *Held* that the letters were not written with a view

to the defence of this suit, and were not privileged from production.—*Paddon* v. *Winch*, L. R. 9 Eq. 666.

*See* Covenant, 1; Revivor.

Evidence.

1. The testator appointed as executors of his will "Francis Courtenay Thorpe, of Hampton, gentleman," and two others. Francis Courtenay Thorpe, of Hampton, was a youth twelve years of age; his father's name was Francis Corbet Thorpe. *Held*, that the description applied only to the son, and therefore there was no ambiguity; evidence that the testator intended the father was excluded. —*Goods of Peel*, L. R. 2 P. & D. 46.

2. Upon a petition for divorce for adultery, the only evidence of the respondent's identity was that of the petitioner. The court refused to act upon this evidence without corroboration.—*Harris* v. *Harris*, L. R. 2 P. & D. 77.

3. Action to recover for work done and materials supplied to certain houses on the order of third persons. It was contended by the plaintiff that the persons giving the order were the defendant's agents, and that the defendant was owner of the houses. *Held*, that evidence was admissible to show that other tradesmen had supplied goods by the defendant's orders for the same houses.—*Woodward* v. *Buchanan*, L. R. 5 Q. B. 285.

4. Notwithstanding the Statutes 32 & 33 Vict. c. 68, enabling parties to any proceedings instituted in consequence of adultery, and their husbands and wives to be witnesses, the court required other evidence than that of the husband to prove non-access, where the object was to bastardize issue.—*In re Rideout's Trusts*, L. R. 10 Eq. 41.

5. Indictment against a woman for endeavoring to conceal the birth of her child by secretly disposing of the dead body thereof. The prisoner had put the body into a field over a wall four and a half feet high separating a yard from the field. The only entrance to the yard was by a narrow passage from the street, and the only entrance to the field was by a gate from a butcher's yard. No person going into the field in his ordinary occupation would see the body. *Held*, that there was evidence for the jury of a secret disposition of the body. —*Regina* v. *Brown*, L. R. 1 C. C. 244.

*See* Admissions; Ambiguity; Practice.

Executor and Administrator — *See* Administrator Pendente Lite.

False Imprisonment — *See* Reasonable and Probable Cause.

False Pretences.

The prisoner obtained the use of a horse for a day by false pretences; he was indicted for obtaining goods by false pretences. *Held*, that to "obtain" means to obtain the property in a chattel, but does not mean to obtain a loan of it.—*Regina* v. *Kilham*, L. R. 1 C. C. 261.

Fixtures.

The lessee of a coal mine constructed therein three railways in the following manner: sleepers were laid upon the ground, and the rails were fastened to them by dog-nails; large quantities of ballast were then packed under and about the sleepers. The rent being in arrear, the lessor distrained these railways, and subsequently sold them under the distress. The purchasers removed them, and in doing so it was necessary to wrench off the rails and to loosen the ballast with a pick and raise the sleepers with a lever. *Held*, that the railways were fixtures and were not distrainable.—*Turner* v. *Cameron*, L. R. 5 Q. B. 306.

Foreign Judgment.

An English ship, while on a voyage to an English colony, was mortgaged by her owner in England, and the mortgage was subsequently assigned to the plaintiff. In the port of the colony the ship was supplied with necessaries, the captain paid for them by a bill drawn on the owner, which was never accepted, and at maturity, was dishonored. This bill was indorsed to French subjects, who commenced a suit against the captain and ship upon their arrival at Havre, and obtained judgment against them, which the Civil Tribunal confirmed, and ordered the ship to be sold. The plaintiff afterwards commenced in the Civil Tribunal a suit in the nature of replevin, and gave evidence of the law of England upon the subject, but the court, mistaking that law, decided against him. The ship was then sold under the judgment to the defendants. *Held*, that the judgment of the French Court was *in rem*, and under the French law transferred the ownership of the vessel, and that although the question of English law was wrongly decided, the title of the vendee could not be questioned in the English courts.—*Castrique* v. *Imrie*, L. R. 4 H. L. 414.

Forfeiture—*See* Burden of Proof.

Forgery.

The 24 & 25 Vict. c. 98, s. 24, makes it felony to forge "any warrant, order, authority, or request for the payment of money." The prisoner forged a receipt for money, and obtained by means of it money from a society;

the jury found that by the custom of the society such documents were treated as warrants, authorities, and requests to pay, and convicted the prisoner. *Held*, that the document was properly described as a warrant, an authority, or a request.—*Regina* v. *Kay*, L. R. 1 C. C. 257.

Fraud—*See* Appropriation; Bills and Notes; Limitations, Statute of.

Frauds, Statute of—*See* Damages.

Fraudulent Conveyance—*See* Charge.

Freight—*See* Insurance, 2; Ship.

Gift.—*See* Construction, 9.

Guaranty.

A bank authorized a company to draw upon it on terms that the company should ship tea and draw upon B. & Co. for its value, accompanied by bills of lading, policy of insurance, and invoice; B. & Co. agreed to accept the bills and forward them to the bank, and agreed to pay the amount due the bank on the 31st December. The company drew bills on the bank; before they fell due the bank stopped payment, but the bills were paid afterwards. The company failed to ship any tea and to perform their part of the agreement. *Held*, that the bank had performed its part of the agreement, and, notwithstanding its failure, B. & Co. were liable; and that their general engagement was not limited to the amount due on the 31st December.—*Ex parte Agra Bank; In re Barber & Co.*, L. R. 9 Eq. 725.

Highway.

In 1811, a road was laid out, fifty feet wide, through a common, by the enclosure commissioners. Allotments of the land on each side were made, and directions given by the commissioners that the allotments should be fenced. About twenty-five feet only of the road were used, and the sides, which were left unenclosed, became covered with fir-trees, heath and furze, which had grown up during the last twenty-five years. A suit was brought by the owner of the adjoining land to restrain the highway board from cutting the trees and furze. *Held*, that the right of the public was to have the whole width of the road free from obstructions, and was not confined to the part actually used; and that this right was not extinguished by allowing the trees to grow.—*Turner* v. *Ringwood Highway Board*, L. R. 9 Eq. 418.

*See* Commitment.

Husband and Wife.

1. A woman, upon marriage, settled her property in trust for her separate use. After marriage her husband became bankrupt, and certain debts incurred by the wife before marriage were proved against him, but he had no assets, and afterward obtained his discharge. *Held*, that the wife's separate property was liable for her debts.—*Chubb* v. *Stretch*, L. R. 9 Eq. 555.

2. *Held*, by the full court, on appeal, that, if force, whether physical or moral, is systematically exerted by a husband for the purpose of bending his wife to his authority, in such a manner, to such a degree, and during such a length of time as to break down her health and render serious malady imminent, there is cruelty which entitles her to a decree for judicial separation.—*Kelly* v. *Kelly*, L. R. 2 P. & D. 59.

*See* Evidence, 2, 4; Settlement, 1; Specific Performance, 1; Wife's Separate Estate.

Ignorance.—*See* Confirmation.

Illegal Contract.—*See* Racing Debt.

Indictment.

Indictment, that the defendant "in and upon one Margaret D., a girl above the age of ten years and under the age of twelve years, . . . unlawfully did make an assault, and her, the said M. D., did then unlawfully and carnally know and abuse, against the form of the statute," &c. The jury found the defendant guilty of a common assault. *Held*, that under the indictment, the defendant might be convicted of an assault.—*Regina* v. *Guthrie*, L. R. 1 C. C. 241.

Infant.—*See* Confirmation, 2

Injunction.

The grantee of a piece of land made a separate agreement with the grantor, that during twelve years and a half no building thereon should be used as a public house. His assignee, one of the defendants, built a house on the land, and let it to the other defendant as tenant from year to year, who used it as a public house. The assignee had notice of the agreement, but the tenant had not. Upon a bill for an injunction, *held*, that the agreement was not binding on the tenant, but that the assignee should be enjoined, the injunction to be suspended until the tenancy should be determined.—*Carter* v. *Williams*, L. R. 9 Eq. 678.

*See* Receiver; Revivor.

Intention.—*See* Residuary Clause, 2.

Insurance.

1. Policy of insurance against fire upon the stock of wheat, &c., in a mill, containing the following clause: "Goods held in trust or on commission must be insured as such, otherwise the policy will not extend to them." Part of the wheat destroyed was received from farmers,

and mixed in large hutches with other wheat received in the same way, and was either sold by the millers, or ground in their mill; the millers had the option of delivering to the farmers wheat of like quality or paying the market-price, but it was not intended that the identical wheat delivered should be returned. The wheat was not insured as goods held in trust or on commission. *Held*, that the wheat was not held in trust, but was sold to the millers, and that it was covered by the policy.—*South Australian Insurance Co.* v. *Randell*, L. R. 3 P. C. 101.

2. Insurance on freight. The ship while on the voyage insured was stranded on the Welsh coast. The ship-owner discharged the cargo and sent it on to its destination by rail, at an expense of £212, and received the freight. The cargo might have been kept until the vessel was repaired, and then reshipped at an expense of £70. *Held*, that under the suing and laboring clause, the ship-owner was entitled to recover from the underwriters the least reasonable amount for which the goods could have been carried forward, which was £70.—*Lee* v. *Southern Insurance Co.*, L.R. 5 C.P. 397.

3. Insurance on a bottomry bond. The bond provided for its defeasance on payment of the amount, or "in case of the loss of said ship, such an average as by custom shall have become due on salvage," or if the ship should be utterly lost, cast away, or destroyed by perils of the sea. The ship became a constructive total loss, and the proceeds were paid to the bondholder. *Held*, that the policy of insurance on bottomry did not cover a constructive total loss.—*Broomfield* v. *Southern Insurance Co.*, L. R. 5 Ex. 192.

4. Insurance on "homeward chartered freight," by the ship Sir William Eyre, which had been chartered while on her outward voyage for a homeward voyage from Calcutta to England; the voyage insured was "from Clyde to Southland, while there, and thence to Otago, N. Z., and for thirty days in port there after arrival." The ship arrived at Southland, where she grounded during a gale and was damaged, but she was got off, and proceeded to Otago; there a survey was held upon her, and some repairs were recommended by the surveyors, but as there was no dry dock the extent of the damage could not be fully ascertained. The master had not sufficient funds to pay for repairs and other liabilities incurred, and for that reason remained at Otago seven months, until he received funds from the plaintiffs; he then made temporary repairs, and proceeded to Calcutta in ballast, where the ship was put into dry dock, and surveyed, and it was ascertained that the cost of repairs would exceed her value when repaired. The surveys and estimates were duly forwarded to the plaintiffs, who at once gave notice of abandonment to the defendants and to the underwriters on the ship; neither of these notices was accepted. *Held*, reversing judgment of C. P., that, as there was a total loss of the power to earn freight, there was an actual total loss of freight, and no abandonment was necessary; *held*, also, that if notice of abandonment was necessary, as it was given as soon as the plaintiff knew the extent of the damage, it was sufficient. (Cleasby, B., dissenting.) Exch. Ch.—*Potter* v. *Rankin*, L. R. 5 C.P. 341.

Investment.

The trustees under a settlement were empowered to invest the trust fund in "the bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country." The question arose, whether they could invest in the bonds of a French railway, guaranteed by the French government. *Held*, that these bonds were not securities of a foreign government, and therefore the investment could not be sanctioned by the court.—*In re Langdale's Settlement Trusts*, L. R. 10 Eq. 39.

*See* Trust.

Joint-Tenancy —*See* Settlement, 2.

Landlord and Tenant.

The plaintiff became weekly tenant to the defendant's father, on terms that the plaintiff should have plenty of time to remove his goods on the termination of the tenancy; and he also had a license from the father to stack timber upon an adjoining wharf, the rent being payable in respect of both. The defendant, after his father's death, received rent from the plaintiff. Subsequently he gave the plaintiff a week's notice to quit, and at the end of the week took possession of the whole premises, and refused to allow the plaintiff a reasonable time to remove his goods. *Held*, that there was no objection to a tenancy determinable by a week's notice to quit; also that there was evidence for the jury that the plaintiff held on the same terms as under the defendant's father, and that he was entitled to a reasonable time to remove his goods.—*Cornish* v. *Stubbs*, L. R. 5 C. P. 334.

*See* Fixtures; Notice, 2.

Lease.—*See* Appointment, 1.

Lease.—*See* Specific Performance, 2; Wife's Separate Estate.

Legacy.—*See* Ambiguity; Construction, 3–8; Cy Pres; Election; Remoteness; Residuary Clause; Will, 3.

Lien.—*See* Bill of Lading.

Light.—*See* Ancient Light.

Limitations, Statute of.

Suit to recover property to which the bill alleged that the plaintiff's ancestors became entitled in 1769. It was alleged in the bill that the certificate of a marriage which formed the principal link in the plaintiff's title had been destroyed, and the register had been fraudulently mutilated, to destroy the evidence of the marriage, and that a transcript of the register was accidentally discovered by the plaintiff in 1868. The Statute of Limitations provides that, in case of concealed fraud, the right of any person shall be deemed to accrue when such fraud shall or with reasonable diligence might have been first known. *Held*, that by reasonable diligence evidence of the marriage might have been discovered more than twenty years before, and that the plaintiff was barred.—*Chetham* v. *Hoare*, L. R. 9 Eq. 571.

## REVIEWS.

The Law of Salvage, as administered in the High Court of Admiralty and the County Courts, with the principal Authorities, English and American, brought down to the present time; with an Appendix, containing Statutes, Forms, Table of Fees, &c. By Edwyn Jones, Esq., of Gray's Inn, Barrister-at-law. London: Stevens & Haynes, Law Stationers, Bell Yard, Temple Bar. 1870.

This is a book equally useful to the American and the English lawyer. It appears to be a carefully written epitome of the principles of the law of Maritime Salvage. The author does not profess to give all the cases relating to the interesting subject of which he treats, but leading cases, both American and English, are noticed in a clear and succinct manner. The arrangement of the book is good. It is not only a book of principles but a book of practice. We have perused its pages with much interest.

There are three principal chapters. In the first the author explains the value of salvage, its ingredients, and gives instances of salvage service, including life service. Having done this, he, in the second chapter, treats of the persons entitled to claim salvage, discussing the rights of the crew, passengers, shipowner, pilots, tugs, ship's agent, and war vessels. He attempts to reconcile the English and American cases, but without success. The differences, however, where differences are irreconcileable, are judiciously pointed out and ably considered. In the third chapter he treats of the different sets of salvors, and distribution between rival salvors. This is a branch of the subject of no ordinary difficulty. But we must admit that the author boldly undertakes the task of expounding it, and creditably acquits himself. The reference to decided cases is very accurate, and whenever possible the language of the Judge is given. The remaining chapters, eight in number, treat respectively of the amount of salvage, apportionment of salvage contribution, misconduct and negligence, detention by salvors, proceedings to recover salvage, jurisdiction and practice of the Court of Admiralty, jurisdiction and practice of the County Court, jurisdiction of Justices, costs and appeal. In the appendix are given portions of several acts pertinent to the treatise, such as the Merchant Shipping Act, the acts regulating the practice of the Court of Admiralty and the County Court, Admiralty Jurisdiction Acts of 1868 and 1869, Admiralty and other forms, together with Schedules of Fees in Admiralty and County Courts.

Small treatises of this kind are becoming numerous, and, when well prepared, are well sustained, because more convenient in form than larger treatises dealing with wide decisions of the law. Abbot on Shipping is no doubt a standard work of acknowledged value and merit. But the law of last year, owing to the multiplicity of decided cases, is not the law of of this year; and it is much more easy to issue small treatises on subdivisions of a great work than to issue new editions of the great work itself. In this manner the profession are likely to have at hand the latest decided cases on particular branches of law in a form very convenient for use. Such works, when carefully prepared, ought to be encouraged because of their own intrinsic usefulness; and they serve as an introduction to the profession of young men of merit, as yet unknown to fame, who would not have the courage, even if they had the ability and intention, to produce larger treatises. Of this class is the book now before us. It is one of the best of its kind, proving the author to be a good lawyer as well as a good text writer. The book contains about 300 pages, is neatly printed, and has a copious and convenient index.

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The Ontario Law List. By J. Rordans. 6th Edition. Toronto: H. Rowsell, 1870.

The utility of this little volume to the legal practitioners of Ontario is already so well known that it scarcely requires from us any special commendation.

We must, however, congratulate the profession on the appearance of a new edition, and the editor upon the care which has evidently been taken to make it a complete handbook of useful professional information.

The introductory chapter gives a brief sketch of the more important changes effected by recent legislation in the jurisdiction and procedure of the Courts; then we have, in the body of the work, a sketch of the Superior Courts of Law and Equity; a list of county and judicial officers, coroners, &c.; a collection of the Acts respecting the profession, together with the rules of the Law Society as to examinations, &c. Next comes the Law List proper, including the Queen's Counsel, Barristers and Attorneys, with the dates of their appointment, call or admission, and a catalogue, classified according to locality, of the practitioners throughout the Province, with their Law and Chancery agents in Toronto.

In a country like our own, where changes of residence, partnership, and agency, are of daily occurrence, perfect accuracy in a list of this description is of course unattainable, and in all cases of service upon a Toronto agent, we should recommend an inspection of the authorized agency books at Osgoode Hall. When, however, such a reference is inconvenient or impossible, Mr. Rordans' work will be found "a friend in need," and no pains have been spared to render it a reliable authority.

We cannot close even the briefest sketch of this useful volume without commending to the practical consideration of principals and students throughout the country the following remarks from the introductory chapter:

> "How many attorneys are there who think it incumbent upon them to instruct, or even to direct the reading of, their clerks? The rule is, that the clerk is worked hard if he takes to work, or let alone if he is idle, though the principal is usually eager enough to claim the credit if the clerk distinguishes himself in the examinations, or obtains a Call with Honors.
>
> "A system more in accordance with the letter and spirit of the articles ought to take the place of this state of things. A spirit of mutual reliance and mutual assistance ought to actuate each, and the principal should be found as anxious to give proper help and instruction, as the clerk to obey his lawful commands."

Comment is needless, and the advice is good. But at the same time students must remember that the practice which, to a certain extent, prevails in this country, of giving salaries to articled clerks, is partly responsible for the evil spoken of—and so long as the very proper and wholesome "spirit of mutual reliance and mutual assistance" is affected by a mercantile spirit, making the relation, to a certain extent, one of dollars and cents, so long will this unsatisfactory state of things continue.

## APPOINTMENTS TO OFFICE.

### LIEUTENANT-GOVERNOR.

THE HON. ADAMS GEORGE ARCHIBALD, of the City of Halifax, in the Province of Nova Scotia, a Member of the Queen's Privy Council for Canada, to be Lieutenant-Governor of the Province of Manitoba, from and after the day on which Her Majesty the Queen shall, by Order in Council, issued under the British North America Act, 1867, admit Rupert's Land and the North West Territory into the Union or Dominion of Canada.

THE HON. ADAMS GEORGE ARCHIBALD to be Lieutenant-Governor of the North West Territories from and after the day aforesaid. (Gazetted July 23rd, 1870.)

### JUDGE SUPERIOR COURT, QUEBEC.

LOUIS EDOUARD NAPOLEON CASAULT, of the City of Quebec, in the Province of Quebec, one of Her Majesty's Counsel learned in the Law, to be a Puisne Judge of the Superior Court for Lower Canada, now the Province of Quebec, in the room and place of FELIX ODILON GAUTHIER. (Gazetted June 4th, 1870.)

### ASSISTANT JUDGE SUPERIOR COURT, QUEBEC.

THOMAS KENNEDY RAMSAY, of the City of Montreal, one of Her Majesty's Counsel learned in the Law, to be Assistant Puisne Judge of the Superior Court for Lower Canada. (Gazetted September 5th, 1870.)

### JUDGE SUPERIOR COURT, NEW BRUNSWICK.

HON. ANDREW RAINSFORD WETMORE, of St John, New Brunswick, Esquire, one of Her Majesty's Counsel learned in the Law, to be a Puisne Judge of the Superior Court of Judication of the said Province, in the room of the HON. NEVILLE PARKER, deceased. (Gazetted May 28th, 1870.)

### DEPUTY JUDGE.

ALLAN JAMES GRANT, of the Town of L'Orignal, in the County of Prescott, and of Osgoode Hall, Barrister-at-Law, to be Deputy Judge of the County Court of and for the United Counties of Prescott and Russell. (Gazetted August 8th, 1870.)

### NOTARIES PUBLIC.

JAMES F. GARROW, of the Town of Goderich, Barrister-at-Law. (Gazetted June 25th, 1870.)

BENJAMIN CRONYN, of the City of London, Barrister-at-Law. (Gazetted June 25th, 1870.)

FREDERICK WRIGHT, of the City of Toronto, Attorney-at-Law. (Gazetted June 25th, 1870.)

CHARLES WALLACE BELL, of the Town of Belleville, Barrister-at-Law. (Gazetted July 16th, 1870.)

RUSK HARRIS, of the City of Toronto, Barrister-at-Law. (Gazetted July 16th, 1870.)

JAMES RUTLEDGE, of the Town of Bowmanville, Barrister-at-Law. (Gazetted July 16th, 1870.)

JAMES CROWTHER, of the City of Toronto, Barrister-at-Law. (Gazetted July 30th, 1870.)

JAMES TILT, of the City of Toronto, Barrister-at-Law. (Gazetted July 30th, 1870.)

ABRAHAM DENT, of the Village of Mitchell. (Gazetted August 13th, 1870.)

HENRY SMITH, of the Town of Cobourg. (Gazetted August 13th, 1870.)

EDWIN D. KERBY, of the Village of Petrolia. (Gazetted August 13th, 1870.)

JAMES MAGEE, of the City of London, Barrister-at-Law. (Gazetted September 10th, 1870.)

GEORGE WILLITS LOUNT, of the Village of Newmarket, Barrister-at-Law. (Gazetted September 10th, 1870.)

JAMES F. LISTER, of the Town of Sarnia, Attorney-at-Law. (Gazetted September 10th, 1870.)

FRANCIS COCKBURN CLEMOW, of the City of Ottawa, Attorney-at-Law. (Gazetted September 10th, 1870.)

ALEXANDER GRANT, of the Town of Stratford, Attorney-at-Law. (Gazetted September 17th, 1870.)

JAMES SMITH READ, of the Village of Orangeville, Attorney-at-Law. (Gazetted September 24th, 1870.)

ALEXANDER GOFORTH, of the Village of Fergus, Barrister-at-Law. (Gazetted September 24th, 1870.)

### ASSOCIATE CORONER.

THOMAS CUMINES, of the Village of Welland, Esq., to be an Associate Coroner within and for the County of Welland.

## DIARY FOR NOVEMBER.

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|---|---|---|
| 1. | Tues. | *All Saints.* |
| 5. | Sat.. | Articles, &c., to be left with Sec. Law Society. |
| 6. | SUN. | *21st Sunday after Trinity.* |
| 13. | SUN. | *22nd Sunday after Trinity.* |
| 16. | Wed. | Last day for service for County Court. |
| 18. | Frid. | Examination of Law Students for call to the Bar. |
| 19. | Sat.. | Examination of Articled Clerks for certificate of fitness. |
| 20. | SUN. | *23rd Sunday after Trinity.* |
| 21. | Mon. | Michaelmas Term begins. |
| 24. | Thur. | Last day for setting down and giving notice of re-hearing. |
| 25. | Frid. | Paper Day, Queen's B. New Trial Day, C. P. |
| 26. | Sat. | Declaration County Court. Paper Day, Common Pleas. New Trial Day, Queen's Bench. |
| 27. | SUN. | *1st Sunday in Advent.* |
| 28. | Mon. | Paper Day, Q. B. New Trial Day, C. P. |
| 29. | Tues. | Paper Day, C. P. New Trial Day, Q. B. |
| 30. | Wed. | *St. Andrew.* Paper Day, Queen's Bench. New Trial Day, Common Pleas. |

# THE
# Canada Law Journal.

## NOVEMBER, 1870.

## THE HON. WILLIAM HUME BLAKE.

It is our sad duty to record the death at Toronto, on the 15th inst., of the Hon. William Hume Blake, Ex-Chancellor of Upper Canada, in his sixty-second year.

Although some years have passed since Mr. Blake retired from his position on the Bench, and thus practically severed his connection with the profession, we cannot permit the occasion to pass without a tribute to his memory.

He was born in the County of Wicklow, Ireland, on 10th March, 1809, at Kiltegan. Of this parish his father, the Rev. Dominick Edward Blake, who died at the early age of fifty from the same disease which has now carried off his son, was Rector. He was educated at Trinity College, Dublin, and was at first intended for the medical profession, having studied under Sir Philip Crampton. He subsequently thought of entering the Church, as in fact did his brother, the Rev. D. E. Blake, late Rector of Thornhill.

In 1832 Mr. Blake emigrated to Canada and settled in the Township of Adelaide with other members of his family, having shortly before he left Ireland married his cousin, Catherine Hume, the grand-daughter of William Hume, M. P. for Wicklow, well known in his day as a loyal gentleman, murdered by the rebels in 1798.

He commenced the study of the law in 1834, in the office of Mr. Washburn; and though he began his legal studies later in life than is usual, he set to work with so much energy that he appeared to compress into a few years the work usually allotted to many. He was a careful and pains-taking reader, and as a student he pursued his studies with an amount of diligence and labour which was only fully understood by those with whom he was intimate, but which formed the stepping-stone to his ultimate success.

Mr. Blake was admitted as a member of the Law Society in Hilary Term, 1835, and was called to the Bar in Easter Term, 1835, Mr. Vice-Chancellor Esten being called in the Term following. In Michaelmas Term, 1845, he was appointed one of the Benchers of the Law Society, the names of the present Treasurer, Hon. J. H. Cameron, and the late Vice-Chancellor Esten, being the next on the list.

He formed a partnership with Mr. Joseph C. Morrison, now the senior Puisne Judge in the Queen's Bench, and they were afterwards joined by the late Dr. Connor, who, as well as his partners, was also, in 1863, elevated to the Bench.

Though for several years one of the most able, fearless, eloquent and successful of advocates, Mr. Blake will be best remembered in his intimate connection with the Court of Chancery, as its first Chancellor. The reformation of this Court was undertaken by the Baldwin-Lafontaine Government, of which Mr. Blake was Solicitor-General, in 1848; and it was then established on its present footing mainly through Mr. Blake's exertions. He was naturally selected by his colleagues as the proper and most desirable person to fill the seat of Chancellor, to which he was appointed on the 30th September, 1849; and the wisdom of the choice was proved by the thorough and efficient manner with which he set to work to remodel and thoroughly renovate and reform the then existing system of Chancery practice in every branch and detail.

The condition of the court at that time, and the tiresome, almost endless delays in even the simplest causes and proceedings had become almost a household word, and it was to remedy this great evil—alike felt by the public and the profession—that the new Chancellor applied himself. With undaunted perseverance and grasping intellect he grappled with the difficulties which presented themselves, swept away a multitude of the unwholesome relics of an effete organization, which impeded the course of equity; and he infused new life into all the branches of the court. Nothing escaped him, and under his able superintendence the most minute details were carefully arranged and organized.

Years have passed since the work in these Augean stables was commenced, and no one who is familiar with what the condition of affairs then was but is ready to testify that the improvements in the practice and procedure in the Court of Chancery of this Province were commenced at the time of Mr. Blake's appointment as Chancellor, and that the abolishment of the then existing evils in the court are to be traced back to that date. That much has been done since there can be no doubt, but it is equally certain that the foundation stone of improvement was successfully laid by him who has just passed from amongst us.

Possessed of a clear and capacious intellect, Mr. Blake's judgments shewed that nothing had been overlooked which could affect the equities between the parties; every point in the case received his careful attention, and had the advantage of being fully digested in a mind that had been stored by years of arduous reading richly with legal lore.

We cannot do better than here quote the interesting and eloquent remarks made by the present learned Chancellor, on the occasion of his first appearing in Court after Mr. Blake's death. No one now living could speak with more confidence than Mr. Spragge on the subject. We copy the following from the *Globe:*

"It fell to the lot of my brother, Mowat, as the first judge of this Court who sat after the death of its first Chancellor, to refer to the event. I desire to express my hearty concurrence in what fell from my learned brother in reference to it. But having sat with the late Chancellor for a number of years, it is fitting also that I should bear my own testimony to his high qualities as a judge. With an intellect that enabled him to grasp more readily than most men the whole of a case, he was yet most patient and pains-taking in the investigation of every case heard before him. He never spared himself, but was always most careful that no suitor should suffer wrong through any lack of diligence on his part. He had, moreover—what every equity judge should have—a high appreciation of the duties and functions of a Court—of the mission, if I may so term it, of a Court of Equity in this country: not to adjudicate drily upon the case before the court, but so to expound the principles of equity law as to teach men to deal justly and equitably between themselves. I have reason to believe that such expositions of the principles upon which this court acts has had a salutary influence upon the country; and Mr. Blake, in the able and lucid judgments delivered by him, contributed largely to this result. He always bore in mind that to which the present Lord Chancellor of England gave expression in one of his judgments: 'The standard by which parties are tried here, either as trustees or co-partners, or in various other relations which may be suggested, is a standard, I am thankful to say, higher than the standard of the world.'

"The death of Mr. Blake has reminded me of the correspondence that took place between him and his brother-judges on the occasion of his retirement from the bench. The first letter is addressed to the late Mr. Esten, and runs thus:

"My dear Vice-Chancellor,—I enclose the copy of a note which I have sent this morning to the Attorney-General. This step has been inexpressibly painful to me, but it has ceased to be a matter of choice, and that being so, I felt that you and Brother Spragge ought to be relieved at the earliest moment from the pressure of extra work.

"So long as life is spared to me I shall recall with gratitude the affectionate kindness with which you have both laboured to spare my weakness.

"That God may bless you both with a long life and usefulness is the heartfelt prayer of your affectionate friend,

"Wm. Hume Blake.

"As I am not very well able to write, I hope Brother Spragge will read this as written to him as well as yourself."

"I have not the answer of Mr. Esten; I must be content to read my own:

"My dear Chancellor,—I deeply regret that the cruel disease under which you suffer has left you no alternative but the painful one of retirement from the bench. During the ten years that I have sat with you, no unkind word, and I feel sure no unkind feeling, has ever passed between us, and I cannot but feel deeply grieved at the severance of such a connection.

"Most sincerely and heartily do I hope that there are yet many years of comfort and happiness in store for you.

"Many thanks for the kind terms in which you communicated to us your intended retirement, and for your good wishes to us personally.

"Believe me always, my dear Chancellor,

"Yours,

"J. G. Spragge."

"Most truly did Mr. Blake say that it was inexpressibly painful to him to leave the bench. I remember well the long, the oft-repeated and painful struggle that preceded his resignation. It was from no love of ease that he retired. It was, on the contrary, a forced withdrawal from active duty, which he was most anxious to continue to discharge; the compulsory inactivity of a most active mind. I have read to you the correspondence that took place on the occasion. The writer of the first letter is now dead. The learned and estimable man to whom it was addressed is also dead, and a twelve-month ago we followed to the grave the kind-hearted and able man who was our second Chancellor. Thus three of the Judges of this Court have passed away. They were all of them men of whom this Court may well feel proud, and I am sure that their memory will be held in high respect by the Court, and by the country that they ably and faithfully served."

Mr. Blake was a warm politician of the Liberal school; and in those days when politics ran high, he was never accused of being lukewarm in his adherence to his party. In fact his ardent, impulsive temperament and high spirit made him enter upon all he undertook—whether we speak of him in the heat of a political contest, in the halls of the legislature, or as an advocate identifying himself with the cause of his client—with a vehement energy which, though it sometimes made him enemies, gained even from them a grudging respect, and made him a reputation which outlives the troublous times when he was best known to the public.

Whilst Sir Edmund Head was Governor General, Mr. Blake was appointed Chancellor of the University, and zealously and earnestly devoted himself to the task of raising the University to the honorable position which it now occupies. All who were brought in contact with him will bear testimony to the conscientious and thorough manner in which the already overworked Chancellor discharged the duties of this office. The magnificent building now occupied by the University was erected mainly through his influence, energy and zeal. He was constrained however by failing health, and the pressing engagements of his judicial life to resign the Chancellorship of the University, when he was succeeded by the late Mr. Justice Burns.

In 1862, ill-health compelled the Chancellor to resign his seat on the Bench; but though he was afterwards appointed one of the judges of the Court of Appeal, he was never able to undertake any judicial duties. He sought relief from the painful disease (gout) which afflicted him by a journey to a milder climate, from which he returned only a few months before his death.

Though the Law Society desired that the remains of one so eminent in the profession should be paid the highest marks of respect by them as a body, the funeral was, at the earnest wish of the bereaved members of his family, quite private, though numerously attended.

## ROYAL MARRIAGE ACTS.

We follow the example of a legal cotemporary in England in referring to the legislation which affects the approaching marriage of the Princess Louise to the Marquis of Lorne. It may be that it is not a matter which touches us very closely, but we are glad to feel that the time has not yet come when we can look with indifference upon a ceremony which, though it is to take place so many thousand miles away, is still of much significance in itself and of interest to the subjects of a hereditary limited monarchy.

Much has been said and written about the evils of the law which, as is generally supposed, has prevented a member of the royal family from marrying a subject, but there is much misapprehension as to the effect of the statutes on the point; nor can it be denied that the practice which has prevailed for so many years has some points to recommend it, although productive of some evil; and it may truly be said that in nothing except in the sound of the title is the English nobleman inferior to the petty German princes who have been taken as husbands for the princesses of England.

But we must not wander from the point. The English *Law Journal* gives the following sketch of the legislation affecting Royal Marriages:—

"It was not till the reign of Henry VI. that any legislation took place with the view of controlling marriages contracted by members of the royal family; but the occasion of the marriage of Katherine, mother to Henry VI., with Owen Tudor, a private gentleman, the statute 6 Henry VI. was passed. That statute prohibited the marriage of a Queen Dowager without the consent of the King for the time being, the reason quaintly assigned being 'because the disparagement of the Queen shall give greater comfort and example to other ladies of estate who are of the blood royal more lightly to disparage themselves.' In the reign of Henry VIII., when kings' wives 'began to multiply on the face of the earth,' Parliament took upon itself to control, to some extent, the marriages of some members of the royal family. The statute 28 Hen. VIII., c. 18, made it high treason for any man to contract marriage with the King's children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters. This statute went but a small way to effect the purpose contemplated by the legislature; for by the letter of the Act the King's sons, or brothers, or uncles would be excluded from the provisions of the Act. These statutes are now matter of history; indeed the 28 Hen. VIII. c. 18, was repealed by the 1 Edw. VI. c. 12. The Act now in force, commonly known as the Royal Marriage Act, is the 12 Geo. III. c. 11. That statute provides, by section 1, that no descendant of the body of his late Majesty King George II., male or female (other than the issue of princesses who have married, or may hereafter marry, into foreign families), shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs or successors, signified under the Great Seal and declared in Council (which consent to preserve the memory thereof is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent first had or obtained, shall be null and void to all intents and purposes whatsoever. Section 2 provides that, in case of any such descendant of the body of his late Majesty King George II., being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the King, his heirs or successors, then such descendant, upon giving notice to the King's Privy Council (which notice is hereby directed to be entered in the books thereof), may, at any time after the expiration of twelve calendar months after such notice given to the Privy Council as aforesaid, contract such marriage, and his other marriage with the person before proposed and rejected may be duly solemnised without the previous consent of His Majesty, his heirs or successors; and such marriage shall be good as if this Act had never been made, unless both Houses of Parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage. The last section of the Act provides that any person who shall wilfully solemnise or assist at the celebration without such consent shall incur the penalties of a præmunire.

"We had occasion to recite these provisions of the legislature about four years ago, on an occasion less auspicious than the present, but we venture to repeat them now in order that the precise state of the law may be better understood. There is one criticism upon the Royal Marriage Act, 12 Geo. III., c. 11, which may be made, and which seems to us to show that the Act must be amended at a future date. The only descendants of George II. exempt from the Act are 'the issue of princesses who may have married, or may hereafter marry, into foreign families.' Therefore the children of the Crown Princess of Prussia, of Princess Louis of Hesse, of Princess Christian of Schleswig-Holstein, and of the Princess Teck, will be exempt from the Act. But as the Marquis of Lorne cannot be held to be a member of a foreign family, it would seem that the issue of his marriage with the Princess Louise will be subject to the Act, and that the Crown may, at a future day, enjoy the right to dictate its wishes as to any matrimonial alliance sought to be formed by the house of Campbell."

## SELECTIONS.

### DEGREES OF NEGLIGENCE.

The distinction between the various degrees of negligence is a doctrine which has been affirmed from the earliest period of the common law. It was, however, received from the civil law without question; and, there being comparatively little opportunity for tracing the history and origin of the civil law further back than the days of Justinian, this distinction has always rested upon an apparently arbitrary foundation,* and has of late been very seriously called in question. Indeed we may say that the general disposition of legal critics has for some years been in favor of ignoring the classification of negligence into degrees as unpractical and useless. The first criticism of this kind which we find in the reports is contained in an opinion of Lord Denman, delivered in 1843, in which he says, "When we find gross negligence made a criterion to determine the liability of a carrier, who had not given the usual notice, it could perhaps have been reasonably expected that something like a definition should have been given to the expression. It is believed further, that in none of the numerous cases on this subject is any such attempt made; and it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists" (*Hinton* v. *Dibbin*, 2 Q. B. 646, 661). This was followed by Baron Rolfe in *Wilson* v. *Brett*, (11 M. & W. 113), who, in an action against a gratuitous bailee, told the jury that he could see no difference between negligence and gross negligence,—that it was the same thing with the addition of a vituperative epithet, and further, that the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. The jury finding for the plaintiff, under these instructions, the court refused to grant a rule for a new trial: Lord Abinger saying, "We must take the summing up altogether; and all that it amounts to is that the defendant was bound to use such skill in the management of the horse as he really possessed." In *The New World* v. *King* (16 Howard, 474), Curtis, J., expressed considerable doubt as to whether any distinction between degrees of negligence could be usefully applied in practice. In *Perkins* v. *New York Central Railroad Co.* (24 N. Y. 207), Smith, J., said, "The difficulty of defining gross negligence, and the intrinsic uncertainty appertaining to the question as one of law, and the improbability of establishing any precise rule on the subject, render it unsafe to base any legal decision on distinctions of the degrees of negligence;" and he also approved the *dictum* of Lord Denman before quoted. In *Wells* v. *New York Central Railroad Co.* (24 N, Y. 181, 190), Sutherland, J., after reviewing the doctrine of degrees of negligence at some length, dismissed it by saying that the classification might be philosophically correct, but was impracticable, and that attempts to make it useful and practicable had produced confusion and made it mischievous. In *Grill* v. *General Iron Screw Collier Co.* (Law Rep. 1 C. P. 612), Willes, J., approved of the *dictum* of Baron Rolfe above cited, and said, "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really an absence of such care as it was the duty of the defendant to use." In support of this view he cited *Beal* v. *South Devon Railway Co.* (3 H. & C. 337); but in that case the court said, "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron, in the Court below, when he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.'" And in the same case in which Mr. Justice Willes expressed the opinion above cited, Montague Smith, J., said, "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence."

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* It is, however, a grave mistake to suppose that any of the principal rules of the civil law are arbitrary. Nothing is better understood than that the Code of Justinian was simply the reduction to form of pre-existing treatises on the law; and every section of that code is to be considered as the mature result of the experience, argument and deliberation of hundreds of years preceding. The classification of care and negligence into three degrees was not invented by Tribonian, but had been found necessary by the practical experience of generations before him, and had doubtless been the subject of repeated discussions, such as are now required to determine the question as a new proposition. Undoubtedly this does not prove that the conclusion reached by the Roman lawyers was correct; nor, even if it was correct then, does it *necessarily* follow that the same classification is adapted to the wants of modern society. But the nature of a bailment is the same in all ages; and there is a strong presumption that rules which were developed by Roman experience, as necessary for the government of such transactions, cannot be safely discarded in our own times. Certainly they must not be set aside, summarily and with contempt, as not evolved from practical experience, simply because we have lost the record of the experience upon which they were founded.

After much consideration and examination, we have come to the conclusion that the root of the whole controversy on this point lies in the assumption, on one side, that the meaning of the word negligence is the want of that care which the law requires, and, on the other side, that its meaning is simply the want of *some* care, whether more or less,—whether required by law, or not so required. In short, if "negligence" means in all cases "*culpable* negligence," the controversy is at once decided, and degrees of negligence should no more be heard of. But this would not abrogate the distinction between degrees of *care*; and the argument in favor of drawing such distinctions, and recognizing them in the law, remains unaffected by any thing which the courts have said in respect to degrees of *negligence*. It is not worth while to discuss the question whether negligence must necessarily mean culpable negligence; for that is a question which has no practical application, except where a contract is made stipulating for or against liability for negligence, or where a pleading alleges negligence. It has been generally held in such cases that the word negligence is sufficient to cover all its degrees;[*] and this ruling may very well stand, without affecting the general question, because it is obvious that in such cases the word negligence is used in the sense of *culpable* negligence. And, with two exceptions, all the cases in which the distinction between degrees of negligence has been mentioned with disapproval have been cases which presented simply this question. The two exceptions referred to were both of them cases in which the judge before whom the cause was tried declined to define gross negligence to the jury, and instructed them particularly what the defendant was bound to do or not to do.[†] It was contended by the unsuccessful parties in those cases that the judge ought to have left to the jury the question whether or not the defendant had been guilty of *gross* negligence. This the court in *banc* overruled, and, as we think, very properly. If degrees of care and negligence are to be recognized, they must be reduced to some legal definition; and the courts ought not to leave juries to determine the naked question whether a party has or has not been guilty of "gross negligence," any more than they would leave a jury to determine whether an ouster has been committed, or whether a base fee exists, or any other question containing a technical legal phrase. The court should determine, as a question of law, whether the defendant was bound to exercise great or slight care, and should be prepared to instruct the jury as to what circumstances would constitute sufficient care on the part of the defendant. Phrases having a technical meaning in law should never be left to a jury without full explanation.

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[*] *Bissell* v. *N. Y. Central Railroad Co.*, 25 N. Y. 442. But the reverse was held in *Illinois Central Railroad Co.* v. *Read*, 37 Ill. 484. See also *American Express Co.* v. *Sands*, 55 Penn. St. 140; *Pennsylvania Railroad Co.* v. *Henderson*, 51 Penn. St. 315.

[†] *Wilson* v. *Brett*, 11 M. & W. 113; *Grill* v. *General Iron Screw Collier Co.*, Law Rep. 1 C. P. 600.

The distinctions between degrees of care and negligence has been recognized in so many cases, both before and since the decisions and *dicta* which we have mentioned above, that we shall not pretend to state more than a few of them. Thus for example it has been uniformly held that a plaintiff is not debarred from recovering, by reason of his contributory negligence, unless he has failed to take ordinary care for his own protection, and that his failure to use great or unusual care, in other words, his slight negligence, would not affect his right to recover.[*]

And it is an established rule in Illinois, and some other States, that a plaintiff, who has been guilty of only slight or ordinary negligence, that is, of the want of *ordinary* care only. can recover notwithstanding this, if the defendant has been guilty of gross negligence.[†]

The necessity of distinguishing between the kinds of care which must be taken by various persons, under different circumstances, is also fully recognized in numerous cases, of which *Nicholson* v. *The Erie Railway Co.* (41 N, Y, 525) is the latest type.[*] In that case the plaintiff's intestines were injured by reason of the omission of the defendant to take precautions against the sudden starting of a train of cars, to which no locomotive was attached, but which a violent gale blew along the track. The plaintiff was at the time crossing the track, without any lawful authority, but by virtue of a bare license, which was implied from the fact of the company never having made any objection to persons crossing at that point. If he had been a passenger on his way to the cars, an entirely different question would have been presented, as was conceded by the court. But, being a bare licensee, the court held that the railway company owed him no duty, and was not in fault for omitting to keep watch of the cars, or to have them fastened up. Earl, C. J., was inclined to follow the opinion of Baron Bramwell, who, in *Southcote* v. *Stanley*, (1 H. & N. 247), held that a mere visitor could recover only for some act of positive *misfeasance*, and not for any *nonfeasance*, or simple omission to act. Upon this point the Court of Appeals did not pass; and neither of these cases is a direct judicial authority for the proposition. It having been suggested that a person inviting another upon his land ought to be liable for gross negligence, or, if the phrase is preferred, for a failure to use even slight care for the guest's protection, it has been answered that this would be in effect leaving the whole question to the jury, and would amount to an abdication by the court of its proper province, inasmuch as if the defendant were a corporation the jury would assuredly find a verdict for the plaintiff. But to this we reply, that it ought not to be left to a jury to determine simply whether the defendant has been guilty of gross negligence or not, but that the plaintiff must point out the particular act which the defendant ought to have done, or which he erred in doing. The court should instruct the jury whether the defendant was bound to do or not to do this specific act, and the jury should determine simply whether the defendant did or did not do it. That the rule laid down by Baron Bramwell is an unsatisfactory one, can, we think, be shown by a very simple illustration. If a man should invite a friend to visit him by night, knowing and concealing the fact that a deep ditch lay between the highway and the house, the only bridge over which was a single plank, which might more easily be missed than found, no one would question his liability for an injury suffered by the person thus invited, if the latter should fall into the ditch in the darkness. This would no doubt be considered an act of fraud. But, supposing that the person thus giving an invitation simply failed to mention the fact, and had no fraudulent intent whatever, can it be seriously claimed that he would therefore be exempt from liability? Clearly not, as we think; nor do we think it would make any difference, if the ditch were a natural one, for the existence of which the defendant was in no way responsible. Yet this would not be an act of misfeasance, but simply an act of gross negligence.

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[*] *Ernst* v. *Hudson River R. R. Co.*, 35 N. Y. 9, 26; *Beisiegel* v. *N. Y. Central R. R. Co.*, 34 N. Y. 622, 628, 632; *Fero* v. *Buffalo, &c., R. R. Co.*, 22 N. Y. 209; *Cook* v. *N. Y. Central R. R. Co.*, 3 Keyes, 476; *Johnson* v. *Hudson River R. R. Co.*, 6 Duer, 633, 645; affirmed, 20 N. Y. 65; *McGrath* v. *Hudson River R. R. Co.*, 32 Barb. 144; *Willis* v. *Long Island R. R. Co.*, *Id.* 398; *Center* v. *F nney*, 17 Barb. 94; affirmed, 2 Seld. Notes, 44; *Eakin* v. *Brown*, I E. D. Smith, 36; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Bequette* v. *People's Transportation Co.*, 2 Oregon, 200; *Newbold* v. *Mead*, 57 Penn. St. 487; *Davies* v. *Mann*, 10 M. & W. 546; *Bridge* v. *Grand Junction R. R. Co.*, 3 Id. 244; *Thorogood* v. *Bryan*, 8 C. B. 115; *Clayards* v. *Dethick*, 12 Q. B. 439; *Butterfield* v. *Forrester*, 11 East. 60; *Whirley* v. *Whiteman*, 1 Head, 610; *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Denio, 255; *Garmon* v. *Bangor*, 38 Maine, 443; *Owings* v. *Jones*, 9 Md. 108.

[†] *Kerwacker* v. *Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; *Galena, &c., R. R. Co.* v. *Jacobs*, 20 Ill. 478; *Illinois, &c., R. R. Co.* v. *Goodwin*, 30 Id. 117; *Illinois Cent. R. R. Co.* v. *Middlesworth*, 43 Ill. 64; *Chicago & Alton R. R. Co.* v. *Gretzner*, 46 Ill. 75; *St. Louis, &c. R. R. Co.* v. *Todd*, 36 Ill. 409; *Macon, &c., R. R. Co.* v. *Davis*, 27 Geo. 113; *Augusta, &c., R. R. Co.* v. *McElmurry*, 24 Id. 75; *Hartfield* v. *Roper*, 21 Wend. 615; *per* Harris, J., *Button* v. *Hudson River R. R. Co.*, 18 N. Y. 248; *Rathbun* v. *Payne*, 19 Wend. 399; *per* Johnson C. J., *Chapman* v. *New Haven R. R. Co.*, 19 N. Y. 341; *Chicago, B. & Q. R. R. Co.* v. *Dewey*, 26 Ill. 255; *Stucke* v. *Milwaukee, &c., R. R. Co.*, 9 Wisc. 202; *Whirley* v. *Whiteman*, 1 Head, 110; *Evansville & Crawfordsville R. R. Co.* v. *Lowdermilk*, 15 Ind. 120; *Lafayette, &c., R. R. Co.* v. *Adams*, 26 Ind. 76.

[*] See also *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Sweeny* v. *Old Colony R. R. Co.*, 10 Allen, 363.

The common sense and common usage of mankind appear to us to recognize a distinction between the degree of care which is to be required from a person rendering a favor, and that which is to be required from a person to whom the favor is rendered. We do not know that this distinction has ever been disputed, except possibly in the case of *Wilson* v. *Brett* (11 M. & W. 113); and that case is not necessarily inconsistent with the maintenance of such a distinction. It was simply held in that case, if we take the opinions of all the judges together, that when a person taking charge of a horse as a matter of favor was shown to be thoroughly familiar with horses, he was bound to use the same degree of care which would be required of a borrower who was not familiar with horses, or, as Lord Abinger put it, that even a gratuitous bailee was bound to use such skill as he possessed. The difficulty of defining these distinctions is not a conclusive objection to their maintenance. There will be very little for courts to do, when they decline to maintain any rule which is difficult of application. Far too much responsibility has already been evaded on this ground; and it is by no means desirable to add to the excuses for failure to do substantial justice. No person who, on leaving the city for the summer, places a valuable piece of furniture with a friend for safe-keeping, free of charge, would expect the same care to be taken of it which he would have a right to expect if the same thing had been borrowed by his friend for the personal use of the latter; and yet it would not be altogether easy to draw a line between facts which would constitute culpable negligence in the one case and in the other.

We think that the distinction between gross negligence, and negligence of a less degree, is one that is by no means so difficult of defining, in a manner sufficient for general purposes, as has sometimes been thought. In some of the old books it has been said that gross negligence was such negligence as was equivalent to fraud; and this, although a serious mistake, nevertheless contained a certain element of truth, which may assist us in reaching a satisfactory definition. We think that gross negligence can be safely defined as such an extreme want of care as would imply an indifference to the injury which may thereby accrue to other persons: in other words, if, under the circumstances of the particular case, a person of ordinary intelligence would not omit to do a certain act, unless he were indifferent to the consequences which might ensue to others from such omission. Any person omitting to do that act should be deemed guilty of gross negligence,—and this without regard to the question whether he was as a matter of fact reckless of the consequences. He must be judged by the standard which will be applied to ordinary men. This, as it seems to us, would supply a test sufficient for all ordinary cases, and capable of application, under the guidance of the court, to every case. This definition may be illustrated by the case of an engineer on a railroad, who, seeing persons on the track at a short distance in advance of the train, takes it for granted that they will take care of themselves, gives them no warning, and makes no effort to stop his train. Undoubtedly, in such cases, the engineer very rarely, if ever, *intends* to injure any one; but it does sometimes happen that, irritated by the constant presence of intruders upon the track, he becomes indifferent to their sufferings, and feels disposed to let them take exclusive care of themselves. On the other hand, where a passenger jumps from a car, while in rapid motion, it is clear that he is indifferent to the risk which he thereby assumes; and he may be justly said to be guilty of gross negligence.

Ordinary negligence, or, if the phrase is preferred, the want of ordinary care, may be established by proof of a much lower degree. It should not be necessary, in order to establish such a case, to raise any presumption in the mind of the court or jury that the defendant was guilty of indifference to the consequence of his acts. Mere thoughtlessness or forgetfulness, and this of a kind not uncommon, might suffice to establish the want of ordinary care. This degree of care is usually defined as that which men of average prudence and common sense take, under circumstances similar to those of the particular case, and where their own interests are to be protected from a similar injury.*

Great care is perhaps more difficult of definition; and yet it is a degree of care so constantly insisted upon, particularly with reference to common carriers, that it is useless to attempt to abandon the term on account of the difficulty of giving a definition. We do not pretend to be able at present to give an explanation of the term which will meet all cases, more particularly for the reason that the courts have, in some cases, sought to lay down what may be called a fourth degree, or "the utmost care."†

It seems, however, that great care is considered to be such a degree of vigilance and caution as is not usually exercised by the average of the community, but which is known to, and practised by, persons of unusual prudence and foresight. No one seems to be required to use a degree of care which is utterly unknown to the community in which he lives; and no one can therefore be said to lack even great care, simply because he has failed to anticipate disasters which might have been foreseen as possible in an extreme case, but which the common sense of a reasonable man must have told him were improbable.[*] On the other hand, the obligation to use great care is not satisfied by simply taking precautions against those dangers which are commonly regarded in the community as inevitable in the absence of such care. Thus, on the one hand, a person who is bound to take great care of property situated in the United States would not be bound to take precautions against the occurrence of an earthquake; whereas in a country where earthquakes occurred in particular districts two or three times in the year, great care might require, in respect to some kinds of property, that precautions should, if possible, be taken for its preservation even from the consequences of an earthquake; or, to take a more familiar and practical illustration, in districts which are subject to freshets, great care would require that property should be placed out of the reach of any freshet that might be considered even remotely probable, while in other districts, although such a freshet might by bare possibility occur, no one would under any circumstances be required to anticipate and provide against it.[†] —*American Law Review.*

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* *Rochester White Lead Co.* v. *Rochester*, 3 N. Y. 463; *Duff* v. *Budd*, 3 Brod. & B. 177; *Schwartz* v. *Gilmore*, 45 Ill. 455.

† *Bowen* v. *N. Y. Central R. R. Co.*, 18 N. Y. 408; *Johnson* v. *Hudson River R. R. Co.*, 20 N. Y. 65.

## LEGAL WIT.

The dullness of law documents is proverbial. "As dull as a law book," is everybody's comparison; and some evil disposed persons even say, "As prosy as a lawyer." But there they are wrong; and the gentlemen of the bar have, as they usually have, the best of their lay brethren. "Bar wit" is the sharpest of wit, as any one who has enjoyed the privilege of attending a bar dinner, or any other social gathering of "attorneys and counsellors at law," will readily admit.

The profession of the law is, in England, almost more than among ourselves, the great avenue to political place, honors and emoluments. It is, in fact, the only road by which men of tact and industry, but lacking hereditary rank, may hope to arrive at once at wealth, fame, and titles. Among the men now famous in British history as government leaders and administrators, few can be found who have not studied and practiced the law; and many of the most celebrated were eminent as lawyers long before they became eminent as statesmen. But many years of briefless waiting have been, and are, necessary ere this eminence is reached. Of Scott, afterward Lord Eldon, it was said that "he waited the exact number of years it cost to take Troy (ten), and had formed his determination to pine no longer, but leave the law, to become junior partner in a grocery business, when Providence sent an angel, in the shape of Mr. Barber, with the papers of a fat suit and a retaining fee." His first success was rapidly followed by a heavy business and prosperity which never left him till he was Lord Chancellor.

Lord Erskine was first in the navy, then in the army, for a little while a chaplain, and finally studied law. He had for some years so little to do, that when a friend met him in Westminster Hall, and congratulated him on his good looks and high spirits (which never forsook him in his most desperate straits), he replied: "I ought to look well, for I am like Lord Abinger's trees; I have nothing to do but to grow."

Thurlow, afterward Lord Chancellor, was the son of a poor curate; and for many years after he was called to the bar was wholly unknown. He had to resort to the most extraordinary expedients to pay his expenses; such as once pretending to buy a horse, riding him on trial to the next assize town, and returning him with a threat against the dealer to bring a suit against him for attempt to swindle by selling him a broken-winded hack. When he accidentally found an opening for the display of his talents, he astonished the bar and never after lacked briefs.

Kenyon was doomed, term after term, to sit on the back benches, unknown, with scarcely any chance of success. But he would not be discouraged. He studied dilligently; constantly increased his knowledge of the law; and at last fortune favored him. He was not eloquent; but he had perseverance, industry, and indomitable resolution; and by these qualities raised himself (a noble example for struggling youth), step by step, from obscurity to honor—from the desk of a stingy attorney to the presidency of the first court of justice in Britain.

Pratt, afterward Lord Camden, though the son of a chief justice of the king's bench, struggled with bitter poverty for eight or nine years, and at last determined to give up the law, when a friend, to whom he had communicated his resolve, got him retained as junior counsel to himself in an important suit, and then willfully absented himself, thus throwing the entire duties of the defence on Pratt. The latter so distinguished himself, that he at once secured the admiration and the business of the court. Mr. Holroyd, afterward an eminent judge, was spoken of, when in his fortieth year, as a "rising young man." Murray, the celebrated Lord Mansfield, one of England's greatest lawyers, of whom Pope wrote that noted distich:

"Blest as thou art, with all the power of words,
So known, so honored, in the house of lords,"

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[*] *Bowen* v. *N. Y. Central R. R. Co.*, 18 N. Y. 408; *Cornman* v. *Eastern Counties Railway Co.*, 4 H. & N. 781; *Deyo* v. *N. Y. Central R. R. Co*, 34 N. Y. 9. See *Brown* v. *Kendall*, 6 Cush. 292; *Aldridge* v. *Great Western Railway Co.*, 3 M. & G. 515; *Center* v. *Finney*, 17 Barb. 94; *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; *Wakeman* v. *Robinson*, 1 Bing. 213; *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679; *Philadelphia & Reading R. R. Co.* v. *Yeiser*, 8 Penn. St. 366; *Boland* v. *Missouri R. R. Co.*, 36 Mo. 484; *Dygert* v. *Bradley*, 8 Wend. 469; *Sawyer* v. *Hannibal, &c., R. R. Co.*, 37 Mo 240.

[†] *Withers* v. *North Kent Railway Co.*, 3 H. & N. (American ed.) 969. Compare *Brehm* v *Great Western Railway Co.*, 34 Barb. 256.

was for many years in the greatest straits, hardly known as a lawyer, and unable to support himself by his profession. He was only continued in it by the liberality of a rich friend, who, hearing of his difficulties, allowed him two hundred pounds per year till he got into business.

Dunning (or Lord Ashburton), studied intensely; lived poorly—taking dinner and supper together to economize time and money, and yet for many years he remained unknown. But once in business, he soon became a leader at the bar, and died, at the age of fifty-two, worth one hundred and fifty thousand pounds. He was three years at the bar without receiving so much as a hundred guineas, all told. During the last twelve years of his life his practice brought in from fifty to sixty thousand dollars per year.

These and many other examples show what patience and industry are necessary, even to genius, to accomplish great results. Young men may treasure them as comforters in those dark hours which almost always precede the dawn of a great success.

We hear of the enormous fees and incomes of lending American lawyers, such as Webster, Choate, David Paul Brown, and others; but the practice of eminent British gentlemen of the long robe is more remunerative than even that of their American brethren. Sir Samuel Romilly realized an income of upwards of $75,000 in the last years of his life; Sir Chas. Wetherell received $35,000 for opposing the Municipal Corporations bill at the bar of the House of Lords; the late Lord Truro's retaining fee in an important cause was $15,000; and these instances by no means stand alone. But, besides fortune, a good position at the bar brings with it an enviable place in the most intelligent and desirable society. Lawyers have been the best clubmen; and the clubs of London have become famous for their wit and wisdom, which they have, in times past, brought together under one roof. Even that exclusive old clique which called itself "The Sublime Society of Beefsteaks," with its "gridiron of 1735 standing out in proud relief from the ceiling of the refectory," and its familiar conceited motto of "Beef and Liberty"—even this, the most snobbish and conservative of clubs, which had no less a man than a drunken and half-paralytic duke for its honored president, gathered its brightest members from the bar. Wilkes, Sergeant Prime (not witty himself, but the cause of wit in others), "Frog" Morgan—so called because he was in the habit of quoting constantly in his arguments in court "Croke Elizabeth, Croke James, Croke Charles," said *Croke* being a reporter who lived in those three reigns—Horne Tooke, and many others more or less famous, were among its members. Cobb was a lawyer, better known in his time as a play-wright, and the author, among others, of an Indian drama called "Ramah Drug," and an English opera, the "Haunted Tower."

"What a misnomer it was," said Arnold, a fellow "steak," to him, "to call your opera the 'Haunted Tower!' Why, there was no spirit in it from beginning to end.'

"The drama was better named "Ramah Drug," exclaimed another, "for it was literally ramming a drug down the public throat."

"True," rejoined Cobb, "but it was a drug that evinced considerable power, for it operated on the public twenty nights in succession."

"My good friend," said Arnold, "that was a proof of its weakness, if it took so long in working."

"You are right," retorted Cobb, "in that respect; *your* play (Arnold had brought out a play which did not survive the first night) had the advantage of mine, for it was so powerful a drug that it was thrown up as soon as it was taken."

The raillery of the Sublime Society was merciless. One Bradshaw was fond of boasting of his descent from the regicide of that name. To whom Churchill, the poet, said: "Ah, Bradshaw! don't crow; the Stuarts have been amply revenged for the loss of Charles' head, for you have not had a head in your whole family since." Sheridan was a Beefsteak, and introduced his brother-in-law, Linley, whose peculiarity was a fondness for telling jokes, of which he always forgot the *point.* He published a biography of his friend Leftly, which, coming up before the society for review, was found to open with the following Johnsonian passage respecting his hero's birth:

"His father was a tailor, and his mother a seamstress; a union which, if not first suggested, was probably accelerated, by the mutual sympathies of a congenial occupation." This, and another passage, excited general applause. The second was a sober truism, stated with admirable seriousness: It is a well-known fact that novelty itself, *by frequent repetition*, loses much of its attraction."

The study of the law does not seem favorable to purity or elegance of style, or exactness of expression. Poor Linley was not alone in his grandiloquence. Mr. Marryatt, a brother of the novelist, once addressing a jury, and speaking of a chimney on fire, exclaimed: "Gentlemen, the chimney took fire—it poured out volumes of smoke—*volumes* did I say?—whole encyclopedias!" "When I cannot talk sense, I talk metaphor," said Curran; and many of his brethren imitate him. Mr. (afterward Sir R.) Dallas exclaimed, in one of his speeches, "Now we are advancing from the *starlight* of circumstantial evidence to the *daylight* of discovery; the *sun of certainty* has melted the darkness, and we have arrived at the facts admitted by both parties;" and Kenyon once addressed the bench: "Your lordships perceive that we stand here as our grandmother's *de bonis non;* and really, my lords, it does strike me that it would be a monstrous thing to say that a party can now come in, in the very *teeth* of an act of parliament, and actually *turn us round*, under color of hanging us upon the *foot* of a contract *made behind our backs!*"

The technical phrases of British law documents form, however, a serious clog in clearness of expression. Many of the commonest terms of the English and Scotch courts must be worse than Greek to laymen. Thus when, in Scotland, a judge wishes to be peremptory in an order, he "ordains the parties to condescend;" when he intends to be mild, he recommends them to "*lose* their pleas." If a man thinks proper to devise his estates for the benefit of the poor, he is considered to *mortify* them. Witnesses are brought into court *upon a diligence*, and before they can be examined they must be *purged*. If a man loses his deceased elder brother's estate, it is called a *conquest;* and there are current such elegant expressions as "blasting you at the horn," "pounding your estate," and "consigning you to the fire;" to which such phrases as "villians in gross," "seized in fee," and "docking an entail" are mere trifles. Of the last term, by the way, there is a good story. A physician, reproaching a lawyer with what Mr. Bentham would have called the "uncognoscibility" of law technicalities, said:

"Now, for example, I could never comprehend what you meant by *docking an entail*."

"My dear doctor," replied the barrister, "I don't wonder at that; but I will explain; it is what your profession never consented to—*suffering a recovery*."

Besides club gatherings, it was and still is customary in the principal circuits in England to hold at certain intervals a court for the trial of all breaches of professional etiquette. The court is held at the circuit table after the cloth is cleared, and the junior member of the circuit presides as recorder; the others, not being prosecutors or culprits, acting as jury. The trial takes place on presentment made by any member of the circuit. If the accused is found guilty he is fined, and the penalty is paid into the wine fund of the mess. Some of the presentments are absurd enough; but all tend to maintain good humor among the rival barristers. An eminent advocate, who has a namesake an eminent comedian, was lately presented on circuit for having inserted the following outrageous puff of himself in a newspaper; "Mr.——delighted us exceedingly on Monday. We do not remember to have seen so much genuine wit displayed ["on the stage" was here erased] without the slightest coarseness. He is the smartest individual in his line whose performances we have ever witnessed." A fine of a half a crown was forthwith imposed on this vainglorious paragraph writer. The papers announce the execution of one John Smith, who had been convicted of murder. On whatever circuit there is a Mr. John Smith, he is immediately found guilty of being hanged, and fined for so heinous an offence. When Lord Abinger was at the bar he presented Mr. Richardson, a great pleader, afterward raised to the bench, for "being the most eminent special pleader of the day!" So grave an offence demanded severe punishment, and Mr. R. was accordingly amersed in a dozen of wine. Mr. Sergeant Hill was very absentminded, and this made him the target of many a practical joke on his circuit. He once argued a point of law for some time at *nisi prius*, and, intending to hand his papers to the judge, gravely drew forth a plated candlestick from his bag and presented it to the bench. Some one, it appeared, had substituted a "traveller's" bag for the sergeant's own. Hill was much delighted when, as not unfrequently occurred, he got the better of his persecutors. So pleased was he on one occasion, at a party given by the sheriff of Northamptonshire, that, on returning, he, by mistake, gave a shilling to his excellent host, and, to the amazement of all his friends, shook hands in the most friendly way with the servant at the door.

Chief among the wits was Jekyll, a man who had a retort ready for all comers. At a public dinner the bottle had passed freely, and Jekyll, who was slightly elevated, having just emptied his, called to the servant, "Here, take away that *marine*." A general of marines sitting near the lawyer felt his dignity touched, and said, "I don't understand what you mean, sir, by likening an empty bottle to a marine?" "My dear general," replied Jekyll, "I mean a good fellow who has done his duty, and who is ready to do it again."

To a Welsh judge, famous as well for his neglect of personal cleanliness as for his insatiable desire for place, he said, "My dear sir, as you have asked the ministry for every thing else, why have you never asked them for a piece of soap and a nail brush?" Kenyon, before mentioned, was somewhat noted for parsimony. Some one told Jekyll that he had been down in Lord Kenyon's kitchen, and saw his spits shining as bright as if they had never been used. "Why do you mention his spits?" retorted the humorist; "you must know that nothing turns upon that." A rascally little attorney named Else addressed him: "Sir, I hear that you have called me a pettifogging scoundrel: have you done so?" "Sir," was the reply, with a look of contempt, "I never said you were a pettifogger or a scoundrel; but I said you were *little Else*." Garrow was examining an old spinster for the purpose of proving the tender of a certain sum of money having been made, but found some difficulty making out his case; Jekyll, who was watching the proceedings, wrote the following and threw it over to his professional brother:

"Garrow, submit; that tough old jade
Will never prove a *tender maid*."

—*Albany Law Journal*.

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Sergeant Cockle, in a suit for the rights of a fishery, asked a witness: "Dost thou love fish?"

"Ay," replied he, with a grin, "but not with *Cockle* sauce."

## CANADA REPORTS.

### COMMON LAW CHAMBERS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### Donelly v. Tegart.

*Con. Stat. U. C. cap. 126, secs. 3, 8—Setting aside proceedings—Laches—Jurisdiction of Clerk Q. B. in Chambers.*

Where (on application to set aside proceedings, as in the case of an action against a J. P., for acts done under a conviction which has not been quashed) the facts relied upon would be a pleadable bar to the action, laches will not be imputed to the defendant because he does not apply before entering an appearance, though it might if he waited until after the expiration of the time for pleading.

The Clerk of the Queen's Bench sitting in Chambers has clearly jurisdiction to entertain such an application.

[Chambers, April 7, 1870—*Mr. Dalton.*]

This was a motion to set aside the proceedings against the defendant in this cause, under Con. Stat. U. C., cap. 126, secs. 8, 8. The action was in trespass against a magistrate, for acts done under a conviction, which conviction was quashed, but not until after the commencement of this action.

By the 3rd section of the above act it is enacted, that no action shall be brought for anything done under the conviction, until the conviction has been quashed; and the 8th section provides that in case such action shall be brought, a judge of the court shall, upon application of the defendant, and upon affidavit of the facts, set aside the proceedings.

The dates of the several proceedings did not clearly appear on the affidavits, but it did appear that the time for pleading had not expired.

Mr. Smith (Cameron & McMichael) shewed cause:

Mr. Dalton has no jurisdiction in the case, as the 8th section gives the jurisdiction to a judge of the court in which the action should be brought.

The defendant was concluded by his laches, inasmuch as he had not moved to set aside the writ of summons until after the plaintiff had declared.

*John Paterson, contra.*

Mr. Dalton.—As to the first point—The 4th and 5th sections of the act respecting proceedings in Judges' Chambers at Common Law, are perfectly clear as to the jurisdiction—there is jurisdiction.

As to the second point—that there was laches on the part of the defendant in not moving sooner—there is more to be said.

The case of *Moran* v. *Palmer*, 13 C. P. 450, to which Mr. J. B. Read has kindly referred me as in point here, was an action against a magistrate in which the venue was local under the same statute. Then the Common Law Procedure Act provides (sec. 8) that where the venue is local the writ of summons must be issued in the county where the venue must be laid. In that case the writ was issued in York, the cause of action being local in Wellington, and the plaintiff in his declaration properly laid the venue in Wellington. After declaration served, the defendant moved to set aside the writ of summons and all proceedings, because it had been issued in York, whereas it should have been issued in Wellington. The defendant's laches was held to conclude him; and it was held he should have moved against the writ before entering an appearance, and his application was discharged. The language of the Chief Justice is very clear:

On this point, he says, at p. 455—"I think the defendant was bound to raise the question as to the writ at the first possible opportunity. If he received a notice of action, that would be some ground on which to apply to a judge for particulars of plaintiff's demand, and having obtained the particulars, he could then have applied to stay proceedings, because the writ was issued out of the wrong county. I apprehend there is no doubt that particulars could be obtained in an action on the case, and could also be obtained before appearance. All the reasoning which applies to promptness in moving against an irregularity in ordinary cases extends to this. The statute, if applicable, requires the action to be brought within six months from the time of the act committed, * * * and if we set aside the writ the plaintiff's action is gone. * * * Whereas if the defendant had applied promptly, the writ might have been set aside in time to enable him to sue out another. It does not appear to me that in a case like this, any more than in any other case, a defendant can lie by and lull his opponent into security, and afterwards apply to set aside proceedings which he might have attacked before."

Now, the enactment which applies to the present case is, that "*no action shall be brought*" under the circumstances.

In *Moran* v. *Palmer* the objection was to practice and the mere manner of proceeding—it did not touch the cause of action—and the defendant was held precluded by the ordinary rule as to laches in cases of irregularity. But here the defect goes to the very cause of action itself—"*no action shall be brought.*"

Suppose that I discharged this summons and the cause went on—if the facts should appear upon proper pleadings at *nisi prius*, as they now appear, what could the Judge do but direct a nonsuit? The words of the statute are so clear that the result is inevitable: there must be a nonsuit or verdict for defendant. If I could agree with Mr. Paterson that the statute affords no other remedy than this application, I should probably have discharged this summons. I should have had, at any rate, to inquire whether the plaintiff, not having moved at an earlier stage, was not precluded now, and the case would have been brought within the authority of *Moran* v. *Palmer*. But it is not so. The facts shew a defence to the action which is a pleadable bar—fatal to the plaintiff's case at the trial, and this being so, I think laches cannot be attributed to the defendant, as he has moved before pleading. Had he pleaded it might be argued that he had abandoned the right to this proceeding, and had put himself upon the jury. But at any time before that he has a right to claim that the proceedings should be set aside. It is certainly as much for the interest of the plaintiff as of the defendant that they should be.

The order is to set aside the writ of summons and all proceedings—with costs of the action and of this application to be paid by the plaintiff.

*Proceedings set aside.*

## McInnes et al. v. Western Assurance Co.

*Arbitration—Staying proceedings—C. L. P. Act, sec. 167.*

By a condition endorsed on a policy of insurance the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators.

An action having been brought on the policy, and an application made under C. L. P. Act, sec. 167, to stay proceedings.

*Held*, 1. That the arbitration intended by the condition was not merely a valuation.

2. That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute.

3. *Per* Mr. Dalton—That the plaintiff was a "party" within the meaning of the 167th section.

Proceedings were accordingly stayed.

[Chambers, July 2, 7, 1870.]

Action on a policy of insurance against loss by fire on certain property of the plaintiffs.

The defendants applied to stay all proceedings in the action under the provisions of the C. L. P. Act, sec. 167, which enacts that when the parties to an instrument have agreed that any difference between them shall be referred to arbitration, and either of them commences a suit against the other, the court or a judge may, if no sufficient reason is shewn why such matters should not be referred, order all proceedings in such action to be stayed.

The application was founded on the conditions endorsed on the policy.

The ninth condition provided that "All persons assured by this Company and sustaining loss or damage by fire are to give immediate notice thereof to the Secretary or Manager of the Company or to the Agent of the Company, should there be one acting for it in the neighborhood of the place where such fire took place, and shall, within thirty days after such loss or damage, deliver to the Secretary or Manager or to the Agent of the Company, as aforesaid, a full and detailed account of such loss or damage, signed with their own hands, and verified by their oath or affirmation." [here follow certain particulars minutely set forth in the conditions] "and also shall produce such other evidence as to any loss or damage by fire as this Company or its Agents may reasonably require. * * * And whenever required in writing, the assured, or person claiming, shall produce and exhibit his books of account, invoices or certified duplicates thereof, where the originals are lost, and other vouchers, to the assurers or their agent in support of his claim, and permit extracts and copies thereof to be made; and until such proofs, declarations and certificates are produced, the loss shall not be payable; and if there appear any fraud or false swearing in the proofs, declarations or certificates, the assured shall forfeit all claim under this policy. When merchandise or other personal property is partially damaged, the assured shall forthwith cause it to be put in as good order as the nature of the case will admit of, aided by a surveyor of the Company, should the board of directors deem it so necessary; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each article. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon; one half the expenses to be paid by the assurers. And it shall be optional with the Company to replace the loss or damage, and to rebuild, or repair the building or buildings within a reasonable time. * * * * * And in case differences shall arise, touching any loss or damage, the Company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators, indifferently chosen in the usual way, who shall, before proceeding with the matter, name a third arbitrator, and the award in writing of the said arbitrators, or any two of them, shall be binding on the parties; each party to pay one half the expense of reference and award."

The next condition endorsed on the policy required that "Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved."

The case was brought before Mr. Dalton, by consent of the parties.

*C. Robinson*, Q. C., shewed cause:

1. The plaintiff is not a party within the meaning of the C. L. P. Act, sec. 167.

2. There is no mutuality, the power being reserved to only one of the parties, and the plaintiff could not enforce an arbitration.

3. The conditions of the policy provide merely for a valuation, whilst the act speaks of an arbitration.

He cited Russell on Awards, last edit. referring to the corresponding section of the Imperial Act; *Cooke* v. *Cooke*, L. R. 4 Eq. 77; *Vickers* v. *Vickers*, L. R. 4 Eq. 586; *Elliott* v. *Royal Exchange Assurance Co.*, L. R. 2 Ex. 287, referred to in *Griggs* v. *Billington*, 27 U. C. R. 520; *In re Newton & Hetherington*, 19 C. B., N. S, 342.

*Kerr, contra*, cited *Russell* v. *Pelligrini*, 6 E. & B 1020; *Seligmann* v. *Le Boutillier*, L. R. 1 C. P. 681; *Wickham* v. *Harding*, 28 L. J. Ex. 215; *Randegger* v. *Holmes*, L. R. 1 C. P. 679; Russell on Awards, 3rd ed. 64, 65; *Scott* v. *Avery*, 8 Ex. 487; *Avery* v. *Scott*, 8 Ex. 497; *Scott* v. *Avery*, 5 H. L. C. 811; *Roper* v. *Lendon*, 1 E. & E. 825; *Hirsch* v. *im Thurn*, 4 C. B. N. S. 569; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; *Tredwen* v. *Holman*, 1 H. & C., 71; 31 L. J. Ex. 398; *Elliott* v. *Royal Exchange Assurance Co., ubi sup.*; *White* v. *Kirby*, 2 Ch. Cham. R. 416; *Griggs* v. *Billington*, 27 U. C. R 535; *Re Anglo Italian Bank & De Rosaz*, L. R. 2 Q. B., 452; *Re Lord*, 24 L. J. Ch. 145; *Vickers* v. *Vickers, ubi sup.*

Mr. Dalton.—It is urged by the plaintiff that he is not a "party" in the sense of the clause, because he has not executed. But it is clear that one may be a party to a deed, or contract, both substantially and technically, without executing it.

Then it is said that there is no mutuality: that this is not an agreement of the parties to refer, but a mere power to refer reserved by one of the parties.

Mutuality is necessary in the proper sense in every contract. I am not aware of any thing peculiar to a reference in this respect. Both parties have agreed here to refer, the defendants by their seal, and the plaintiff by his acceptance of the policy. The circumstances in which there is to be a reference are, 1st. Differences touching loss or damage; and, 2nd. The election of the company to refer them. In such cases both parties have agreed to arbitrate. Before action the company gave notice.

The great object is to give effect to agreements exactly as parties make them. An action would lie by the company against the plaintiff for the refusal to refer, but in that the damages would be nominal. It has been assumed in argument that these stipulations of the agreement do not give a pleadable defence. If so, I see no "sufficient reason" why the matters in difference should not be arbitrated on, and this application is the only means the company have of enforcing that power which the contract reserves to them.

I have been referred to several cases as to the distinction between a "valuation" merely and an arbitration. The former is not within the Common Law Procedure Act, section 167. But I think that it is an arbitration strictly, which is provided for here, not merely a "valuation." See for the distinction, *Mill* v. *Bayly*, 2 H. & C. 36; *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Anglo Italian Bank* v. *De Rosaz*, L. R. 2 Q. B. 452; *Re Hopper and Barningham*, *Ib.* 367; *Re Lord*, 24 L. J. Ch. 145.

*Order staying proceedings.*

From the above order of Mr. Dalton the plaintiff appealed to a judge, and the matter was subsequently re-argued by the same counsel before Mr. Justice Gwynne, who, on the 7th July, delivered the following judgment, sustaining Mr. Dalton's order:

Gwynne, J.—It was agreed that the matter was brought before Mr. Dalton by consent, and no objection therefore was taken as to his jurisdiction to make the order, and it is now agreed that if necessary this motion may be treated as before me, not only by way of appeal from Mr. Dalton's order, but also by original application for an order for stay of proceedings upon the same material as was laid before him.

The question arises under a condition endorsed on a policy of insurance executed by the defendants with and in favor of the plaintiffs, and set out above.

It was admitted by both parties that these conditions did not make the ascertainment of the loss by arbitration a condition precedent to any right of action accruing as within the principle of *Scott* v. *Avery*, 8 Ex 497, and 5 H. L. C. 811; *Roper* v. *Lendon*, 1 El. & El. 825; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; *Elliott* v. *Royal Exchange Assurance Co.*, L. R. 2 Ex. 237. This point having been thus withdrawn from my consideration I express no opinion upon it.

In view of the matters in dispute which have arisen in respect of "merchandise or other personal property partially damaged," and of the general language of the 9th and 10th conditions taken together I desire merely to guard myself (as the point was not argued, but on the contrary waived), from being supposed to express any opinion upon the point.

Mr. Robinson's contention was, that the 167th section of the Common Law Procedure Act did not apply to such a provision in relation to arbitration as that extracted above from the 9th condition endorsed on the policy, for the reason, that, as he contended, there was no mutuality, as the plaintiffs could not enforce an arbitration, and whether there should be an arbitration or not rested in the sole will of the defendants.

That the clause was intended to have some effect there can be no doubt, and that, whatever may be its meaning, it forms part of the contract between the parties comprised in the policy of insurance, there can be no doubt. If the intention of the parties by making this clause a part of their contract was that it should operate in any given event to secure a determination of differences between the parties by an arbitration, then, upon the authority of *Russell* v. *Pellegrini*, 6 El. & Bl. 1020, 1029, and *Seligmann* v. *Le Boutillier*, L. Rep. 1 C. P. 681, it must be admitted now that the intention of the clause in the Common Law Procedure Act was to enable the courts to carry out contracts to refer disputes, as far as might be.

Now the condition of the policy provides only for the case of differences between the parties "touching any loss or damage by fire to the parties insured." From the nature of the contract and of the condition, the assured are the only persons who in respect of such matter could be plaintiffs in an action at law, and the assurers are the only persons who could be the defendants in such action, and who could apply to the court for an order to stay proceedings in consequence of the action being brought in violation of the terms of the agreement to refer. To object then that the agreement is void for want of mutuality by reason of the assured not being placed in a position of being entitled equally with the assurers to the benefit of the 167th section is to object, that there can be no valid agreement in a policy of insurance to refer to arbitration the question touching any loss or damage suffered, if that alone be the matter in difference. What the section contemplates providing for is the case of an action being brought by a plaintiff notwithstanding an agreement contained in the instrument for a reference to arbitration in a given event, which it is contended by the defendants has arisen. Now I do not see how it can be judicially held that the clause in the 9th condition relating to arbitration shall have no effect at all for want of mutuality, because it provides only for a case in which the assured alone ever could be plaintiffs in an action relating to the matter in difference.

The expression in the clause, "The company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators," may not be a felicitous expression, but I think effect can and should be given to it notwithstanding.

This condition being by the policy declared to be part of the contract involved in the policy, it will then read: "It is agreed between the parties hereto that in case differences shall arise touching any loss or damage the company reserves to itself the power," or, "shall have, the power of having the loss submitted to the judgment of arbitrators." The plaintiffs agree that the company shall have the power of having the loss or damage submitted to the judgment of arbitrators.

The agreement in substance is, that in the event of the plaintiffs making a claim for loss or damage from the risk insured against, and in the event of differences arising between the parties as to such loss or damage claimed, and in the event of the defendants requiring an arbitration the matters in difference shall be referred. Now all the events, upon the occurring of which the parties have agreed that there shall be an arbitration, have occurred. Some effect surely should be given to this agreement, but there are only two ways in which effect can be given to it, namely, either by holding that the ascertainment of the amount of the loss or damage by arbitration is a condition precedent to any action being brought by the assured in respect of loss or damage claimed, or by holding that the defendants, the assurers, may apply to the court under the 167th section of the Common Law Procedure Act in the event of the assured, notwithstanding defendants request to refer the matter to arbitration, bringing an action to recover the loss or damage claimed; when the court may, upon being satisfied that no sufficient reason exists why the matters in difference should not be referred to arbitration, according to the agreement in that behalf, cause the agreement to be performed by staying all proceedings in the action. In order to give effect to the intention of the parties as appearing on the instrument, I think Mr. Dalton has rightly held that the 167th section of the Common Law Procedure Act does apply to this case.

Mr. Robinson further contended, that the matter in difference was a mere "valuation" and not a matter for arbitration; but I think there can be no doubt that the amount of the loss or damage if any sustained by the plaintiff, whether the mode of ascertaining that amount be called a "valuation," or a "calculation," or "appraisement," or by any other name, is a proper subject for arbitration as much as it is a proper subject of an action. I am of opinion therefore that Mr. Dalton's order should be affirmed, or if desired, I will make an order in like terms, so as to avoid all objection, if any there can be, after consent of parties, as to Mr. Dalton's jurisdiction.

*Order accordingly.**

## Molloy v. Shaw.

*Setting aside arrest—Discretion of County Judge—Sufficiency of material—Entitling affidavits.*

It is not a valid objection to an order to hold to bail that it was granted upon affidavits which were not entitled in any court; following *Ellerby* v. *Walton*, 2 Prac. Rep. 147.

A Judge of a Superior Court will not interfere where the County Court Judge has exercised his discretion.

[Chambers, July 12, 1870—*Richards, C.J.*]

On the 2nd of June the defendant was arrested upon a writ of *Capias ad respondendum* issued upon the fiat of the Judge of the County Court of the County of Wellington, and gave bail to the limits.

On the 12th of June *M. A. Dixon* obtained a summons calling on plaintiff to show cause why the order to hold to bail, the writ of *capias* issued thereon, the copy and service thereof, and the arrest of the defendant thereunder, should not be set aside with costs; or why the said writ of *capias*, and the copy and service thereof, and the arrest of the defendant thereunder, should not be set aside with costs; or why the arrest of the defendant should not be set aside with costs, and the bail bonds delivered up to be cancelled, on the following grounds,

1. That the affidavits to hold to bail were not nor was either of them entitled in any court;

2. That the affidavits did not show or allege a cause of action against defendant by the plaintiff sufficient to authorise the granting of an order to hold to bail;

3. That the affidavits did not show such facts and circumstances as would justify the granting of the order on the ground, that defendant was about to quit Canada, with intent, &c.;

4. That the defendant was not about to quit Canada with intent, &c.

*McGregor* shewed cause, and cited *Ellerby* v. *Walton*, 2 Prac. Rep. 147; *McGuffin* v. *Cline*, 8 C. L. J., N. S. 291.

*Dixon*, *contra*, cited *Allman* v. *Russell*, 9 U. C. L. J. 80; *Swift* v. *Jones*, 6 U. C. L. J. 63; *Terry* v. *Comstock*, 6 U. C. L. J. 235, and the Statutes and Practice.

Richards, C.J.—I do not feel warranted in setting aside the arrest on the ground that defendant was not about to quit Canada with intent, &c. The learned Judge of the County Court exercised his discretion in the matter, and on the material produced I cannot say he is wrong.

As to the defective entitling of the affidavits, *Ellerby* v. *Walton*, 2 Prac. Rep. 147, is express authority in favour of the plaintiff, and was decided in the full court. In the face of that decision I do not feel warranted in setting aside the arrest. I have less hesitation in arriving at this conclusion, as the amount for which he was held to bail is not large, and he says he is possessed of property, so that he will have no difficulty in procuring bail. As the last Chamber decision was in favor of the view now contended for by defendant, I shall discharge the summons without costs.

*Summons discharged.*

## McMurray v. Grand Trunk Railway Co.

*Short notice of trial "if necessary."*

[Chambers, Oct. 15, 1870—*Mr. Dalton.*]

By the terms of an enlargement on a summons in Chambers, the defendants were to take "short notice of trial if necessary."

Mr Dalton.—I understand the words "short notice of trial if necessary" to have reference to the state of the cause and not to the convenience of the parties, even though that convenience may be as to their ability to procure evidence and prepare for trial.

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* In Michaelmas Term the plaintiffs moved the Court of Queen's Bench against this order, with what result we cannot yet say.—Eds. L. J.

## ASSESSMENT APPEAL FROM COURT OF REVISION.

### In the First Division Court in the County of Elgin.

*Court of Revision—Appeal.*

Power of the Court of Revision to grant time for entering appeals beyond that prescribed by the Municipal Assessment Act—Practice in appeal cases—Notice of appeal, and necessity for stating grounds as causes and matters of appeal—Right of counsel to be heard before Courts of Revision and all other courts.

[St. Thomas, July 7, 1870.]

*McDougall* and *White* for appellant.

*Ellis* for respondents.

Hughes, Co. J.—There were several legal points raised which I have to dispose of, the first being as to the notice of these appeals. I decide that all that the 63rd section of the stat. 32 Vic. chap. 36, requires, is that if a person be dissatisfied with the decision of the Court of Revision he may appeal therefrom, and, within three days after the decision, serve upon the Municipal Clerk a written notice of his intention to appeal to the County Judge. The clerk is, thereupon, to notify all the parties appealed against, in the same manner as is provided for notice of complaint by the 60th section. The party appealing is, at the same time, and in like manner, to give a written notice of his appeal to the clerk of the Division Court within the limits of which the municipality or assessment district is situated, and to deposit with him $2, &c.

These notices were given both to the clerk of the council and the clerk of the proper Division Court. But a preliminary objection is taken to their form, and to the ground stated as the cause and matter of the appeals, which it is urged are in most of the cases insensible, inasmuch as the fourth sub-section of section 60 of the Assessment Act of 1869 does not refer to, or require a written notice to be served.

Judging from the analogy which subsists between all these appeals, and the principles which govern appeals from orders and convictions of justices, and appeals against county rates in England, I think the decided cases must govern me in these matters. I find that the Ontario Assessment Act of 1869 does not require the notices of appeal to state any grounds of the causes and matters of appeal. This being the case, a simple notice of appeal properly framed and served is all that the statute requires, and as the grounds of appeal taken are not calculated to mislead, I think what is stated may be treated as surplusage.

It was not complained that the respondent was misled, otherwise I should have adjourned the hearing of the cases to another day, so that the respondents might not be affected by surprise, if alleged.

The case of *The King* v. *The Justices of Westmoreland* was very like the present. It was there held that it was not necessary, in a notice of appeal against a county rate, to specify the grounds of appeal; but if the appellant stated in the notice as causes of appeal *things which were not so*, the court ought to adjourn the appeal if they think the respondents have been misled by the terms of the notices, or otherwise to hear it. I think the preliminary objection was not entitled to prevail in any of the cases referred to in the annexed schedule, where the reason given is, "inasmuch as no written notice was served upon the clerk in conformity with sub-section 4 of section 60 of the Assessment Act of 1869," or where the words of the notice import the same reference to that sub-section. Where the sub-section of a statute is expressly referred to, as was the case in these instances, and where the notices set forth that sub-section had not been complied with, I can, and I think any one could, by referring to the sub-section, easily understand what was meant by the allegation that a notice was not given in conformity with its provisions; because the Court of Revision has the power conferred upon it of extending the time for making complaints ten days further.

Now the extending the time gives to each complainant (and the assessor or any one else may be the complainant) the right to make complaint, and that involves the giving to the assessor and to the party whose assessment, or the omission of whose name or property is complained of, a notice by the municipal clerk, as provided by the 2nd sub-section of the 60th section. And I think it does not require any wide stretch of the imagination to discover what was meant by the complaint that that notice was not given.

It turns out, however, that in several of the cases the cause of complaint was that the Court of Revision, upon the complaint of Mr. McBride, first acted upon the 4th sub-section and extended the time for making complaints ten days further, and adjourned the court, for the purpose of hearing those complaints, to the 23rd of May; and that afterwards, on the 23rd May, they did, at the instance of the assessor, further extend the time for making complaints for another ten days, thus actually going beyond the statute, by extending the time more than *twenty* days. The powers of the court are expressly conferred and limited by statute, so that whatever power the statute gives can be exercised without doubt, but whatever the statute limits or restrains cannot be exceeded. The proceedings of the court are definitely prescribed, and, unlike courts which have no practice laid down, they have no power to frame a procedure for themselves. Their duties, by the 59th section, are to be completed and the rolls to be finally revised, in so far as they are concerned, before the 15th of June in every year; and although under the 55th section they may meet and adjourn at pleasure, or may be summoned to meet at any time by the head of the municipality, they cannot adjourn to a period beyond, nor can they be summoned to meet for performance of their functions on or after the 15th June. Anything done by them on or after that day is void, for the court becomes *functus officio* by effluxion of time, subject to their being summoned to meet again for the discharge of duties or exercising special powers under the 62nd section. The assessor was bound by the 49th section to make and complete his roll not earlier than the 1st of February and not later than the 15th of April. He was to deliver (under the 50th section) the assessment roll completed and added up, with certificate and affidavit attached, to the clerk; and the officer last named was bound to file and keep the roll in his office, and at all convenient times to keep it open to the inspection of all the householders, tenants, and freeholders, resident, owning or possessing property in the municipality.

A time is to be appointed for the court to meet and try complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum. Within the time from the return of the roll at the office of the municipal clerk and the assembling of the court, all parties have the power of examining the roll at the clerk's office, and any person complaining of an error or omission in regard to his own or any other person's assessment, may, within fourteen days after the time fixed for the return of the roll, give notice to the clerk that he considers himself aggrieved, &c., and if a municipal elector thinks that any other person has been assessed too high or too low, or has been wrongfully inserted in or omitted from the roll, he may complain, and the matter is to be decided in the same manner as complaints by a person assessed; so that ordinarily the complaints cannot be made under the 1st and 2nd sub-section of the 60th section later than fourteen days after 15th April, which would be the 29th of April. But the court may sit for the hearing of such complaints at any time, and adjourn from time to time, within the limits of their existence, up to the 15th June, on which day, without any power of revival, they become defunct for all purposes of complaints under the 60th section. The 4th sub-section of the 60th section gives no power, no matter what palpable errors need correction, for the court to resume its functions. The court may, within the limit of its existence, but not afterwards, extend the time for making complaints ten days further, and may then meet and determine the additional matter complained of upon palpable errors being made to appear as needing correction. That cannot be done, however, after the 15th of June. The 62nd section, it is true, confers upon the court further powers after the 15th June for certain other purposes, but those powers are so expressly limited and specific that they cannot be held to apply to these appeals.

It was not objected that anything was done by the court on or after the 15th June, but that they once legally exercised, and once after that illegally affected to exercise the powers conferred upon them by the 4th sub-section of the 60th section It very plainly appears that by the last words of the 3rd sub-section the court could do nothing upon its own motion with regard to altering or amending the roll, *except upon complaint*. If after a complaint either party failed to appear, the court might proceed *ex parte*, so that if there were no complaints the court had nothing to do, and its functions would cease from having discharged its duties, provided all the complaints were disposed of.

If, however, in the discharge of its functions, the court itself discovered, or if it was otherwise made to appear, that there were palpable errors which needed correction, the court might extend the time for making complaints *ten days further*, and might then meet and determine any additional matter complained of; and the assessor might for such purpose (supposing there were no other person to make the complaint) be the complainant.

I think this function could only be discharged by the Court of Revision *once*, and they had no power to extend the time for making complaints *twenty* days, but only fourteen days, as limited and allowed by the 4th sub-section.

When Mr. McBride appeared, it was the 9th of May, the first day on which the Court of Revision sat. The assessor had been derelict in his duty in returning the roll, and was punishable. Still, the law, with regard to making complaints, is specific—they must be made within fourteen days after the 15th of April. The time had gone by for further complaints, for at least six days' notice is required by the 11th sub-section of the 60th section. So that I must hold that the application of Mr. McBride for, and the grant by the court of, an extension of time, could have only been legal under the 4th sub-section of the 60th section: that the court could only (legally) once grant such an extension. If they could assume the power of giving it twice—or two extensions—there would be no use in the limit fixed by the statute of confining complaints to ten days. The 4th sub-section does not say the court may extend the time for making complaints *from time to time* for ten days at a time, but *for ten days further*, and the court might then meet and determine the additional matter complained of. Beyond those ten days they could not adjourn, extend, or adjudicate.

I have no doubt, however, that in granting that extension it is general in its nature, and not confined to the person who might happen to make manifest the palpable errors which needed correction; but that it was open for any person to make whatever complaints he might think proper: that the court could not of its mere motion assume powers of extending the time for making complaints to any one in the absence of a complainant, no matter what the injustice might be, nor how illegally or negligently the assessor had acted in the discharge of his duties; that the only power they could invoke after the fourteen days had passed from the time fixed for the return of the roll, for the extension of the time for making complaints, was the provision of the 4th sub-section; and where there is a jurisdiction and power conferred by law, I suppose it will be proper to presume, in the exercise of it, that the principle *omnia rite esse acta* applies; there was certainly jurisdiction to support the proceeding once, that is, the first time it was exercised, but not twice. The second time, therefore, was illegal.

Having stated my view of the law of this case, I proceed now to dispose of the facts *upon the law*.

1st. I decide that the application made to the Court of Revision was, and could only have been, an application, and the extension of time for making complaints under that application could only have been exercised by the court under the 4th sub-section of the 60th section: that the record of the court is incomplete, but the evidence given outside of the record sufficiently shows facts from which I can presume the court acted in order to make their proceedings on the 9th of May legal.

2nd. I decide that all cases which were appealed upon that extension by any one within the ten days were legally made, whether by Mr. McBride or any one else.

3rd. I decide that the affected granting of the *second* extension of time upon the application of the assessor on the 23rd of May was illegal; that the proceedings upon his appeal were void and *coram non judice;* that all alterations or additions made to the roll by the Court of Revision upon complaints or appeals made after the 23rd of May were entirely *ultra vires*; so that if any such were made in the cases referred to in the annexed list and schedule, they are hereby set aside, and the clerk of the municipality of the township of Bayham is hereby ordered to alter and amend the roll according to this my order, and to restore the roll to its original state in respect thereof, pursuant to the 65th section of the said Assessment Act.

4th. I further decide that the names of the following persons were improperly ordered to be struck out of the said roll by the said Court of Revision, and I order their said names to be restored as they were originally entered therein, viz.: Robert W. Locker, Andrew M. High, Jesse Millard, Wm. H. McCollum, Edwin A. Weaver, James H. McKinney, Elisha Howell, Jeremiah McKinney.

5th. I further decide that the names of the following persons were improperly ordered by the said court to be inserted in the said roll, and I order their names to be erased therefrom, viz.: Joseph Stansell, Thos. Baker, Andrew Shingler, James Oliver.

6th. I further decide that the names of the following persons were improperly ordered to be left in the said roll by the said court when they ought to have been ordered to be struck off and erased therefrom, and I order them to be erased therefrom, viz.: Benjamin Drake, Heman A. McConnell, Robert W. Smuck.

7th. I further decide that the said roll ought to be amended in other respects as follows, viz.: Charles B. Saxton should have been assessed as tenant for six acres, a part of the east half of lot number 9, in the second concession, at $20 per acre—whole value $120.

8th. I further decide that the name of the following person was properly ordered by the said Court of Revision to be left on or inserted in the said roll, and I confirm the decision of the said court with respect thereto, and I order the appellant to pay the costs of this appeal with respect to it, viz.: William Stratton.

Were a good purpose likely to be served by any remarks I might make, I should animadvert in terms of strong censure upon the way in which the functions of a court were discharged by the members of this Court of Revision. I shall, however, forbear making them, knowing that when in the discharge of duty men allow themselves to be actuated by strong sectional or political feelings, they are in no mind to listen to or benefit by words which might under usual circumstances serve for the public good. Still, I do insist and maintain that when a member of the bar may be heard before the highest tribunals of the land, and even before the Queen herself in her Privy Council on an appeal from one of his own courts in this Province; that that court, or the members of that court, must be very ignorant, indeed misguided, who would refuse him audience before a petty local tribunal such as a township Court of Revision.

Lastly. With respect to the costs in all the cases (with the exception of those referred to in finding eight, that is to say, regarding the appeal respecting the case of William H. Stratton), I order that all the costs of these proceedings in appeal be borne and paid by the municipality of the township of Bayham to the appellant forthwith.

## UNITED STATES REPORTS.

### SUPREME COURT OF MICHIGAN.

### City of Detroit v. Blakeby and Wife.

A municipal corporation is not liable, in a private action for damages, for injuries caused by neglect to keep its streets in repair.

The cases founded on mere neglect to repair, and on acts of positive misfeasance reviewed and distinguished by Campbell, C. J.

[9 Am. Law R. 670.]

This was an action by defendants in error, against the City of Detroit, for damages received from the defective condition of a cross walk. In the Wayne Circuit Court the defendants in error had a verdict and judgment, to which the city took this writ of error.

The opinion of the court was delivered by

**Campbell, C. J.**—The principal question in this case is, whether the City of Detroit is liable to a private action of an injured party for neglect to keep a cross walk in repair. The other questions involve an inquiry into the circumstances which would go to modify any such liability in the present case.

There has been but one case in this State decided by this court, where the claim for damages arose purely out of a neglect to repair. In *Dewey* v. *Detroit*, 15 Mich., 307, such a suit was brought, but it did not call for a decision upon the main question. In *Township of Niles* v. *Martin*, 4 Mich., 557, it was held there was no such liability in a township, and this case was followed by us at the present term in *Township of Leoni* v. *Taylor*. It was held in *Larkin* v. *Saginaw County*, 11 Mich., 88, that a county could not be sued for directing a bridge to be built on a plan that was defective and injurious. In *Pennoyer* v. *Saginaw City*, 8 Mich., 534, a city was held liable for continuing a private nuisance which it had created, and in *Corey* v. *Detroit*, 9 Mich., 165, the City of Detroit was held liable for an accident caused by leaving an excavation in a street for a sewer imperfectly guarded. In *Dermont* v. *Detroit*, 4 Mich., 135, it was held the city was not liable for the flooding of a cellar by a sewer, into which it drained. None of those cases presented the precise question raised here, and we are required therefore to consider it as an original inquiry, except in so far as it may be affected by any principles involved in the cases already decided.

The streets of Detroit are public highways, designed like all other roads for the benefit of all people desiring to travel upon them. The duty or power of keeping them in proper condition is a public and not a private duty, and it is an office for the performance of which there is no compensation given to the city. Whatever liability exists to perform this service to the public, and to respond for any failure to perform it, must arise, if at all, from the implication that is claimed to exist in the nature of such a municipality.

There is a vague impression that municipalities are bound in all cases to answer in damages for all private injuries from defects in the public ways. But the law in this state and in most parts of the country, rejects this as a general proposition, and confines the recovery to cases of grievances arising under peculiar circumstances. If there is any ground for recovery here, it is because Detroit is incorporated, and it depends therefore on the consideration whether there is anything in the nature of incorporated municipalities like this which should subject them to liabilities not enforced against towns and counties. The cases which recognise the distinction apply it to villages and cities alike.

It has never been claimed that the violation of duty to the public was any more reprehensible in these corporations than outside of them; nor that there was any more justice in giving damages for an injury sustained in a city or village street, than for one sustained outside of the corporate bounds. The private suffering is the same and the official negligence may be the same. The reason, if it exists, is to be found in some other direction, and can only be tried by a comparison of some of the classes of authorities which have dealt with the subject in hand.

It has been held that corporations may be liable to suit for positive mischief produced by their active misconduct, and not by mere errors of judgment, and while the application of this rule may have been of doubtful correctness in some cases, the rule itself is at least intelligible and will cover many decisions. It was substantially upon this principle that the case of *Detroit* v. *Corey* was rested by the judges who concurred in the conclusion. *Thayer* v. *Boston*, 19 Pick., 511, was a case of this kind, involving a direct encroachment on private property. *Rochester White Lead Company* v. *City of Rochester*, 3 N. Y., 465, where a natural water course was narrowed and obstructed by a culvert entirely unfit for its purpose and not planned by a competent engineer, is put upon this ground in the decision of *Hickox* v. *Plattsburg*, cited 16 N. Y., 161; *Lee* v. *Village of Sandy Hill*, 40 N. Y., 422, involved a direct trespass.

The injuries involved in these New York and Massachusetts cases referred to, were not the result of public nuisances, but were purely private grievances. And in several cases cited on the argument, the mischiefs complained of were altogether private. The distinction between these and public nuisances or neglects, has not always been observed, and has led to some of the confusion which is found in the authorities. In all the cases involving injuries from obstructions to drainage, the grievance was a private nuisance. In case of *Mayor* v. *Furge*, 3 Hill, 612, which has been generally treated as a leading case, the damage was caused by water backing up from sewers not kept cleaned out as they should have been: *Barton* v. *Syracuse*, 36 N. Y., 54, involved similar questions, as did also *Childs* v. *Boston*, 4 Allen, 41. These cases do not harmonise with *Dermont* v. *Detroit*, 4 Mich., 135; but they rest on the assumption, that having constructed the sewers voluntarily for private purposes, and not as a public duty, the obligation was complete to keep them from doing any mischief, as it would be in private persons. And in *Bailey* v. *Mayor*, 3 Hill, 538; S. C., 2 Denio, 433, the mischief was caused by the breaking away of a dam connected with the Croton water works, whereby the property of the plaintiff was destroyed. In this latter case the judgment rested entirely upon the theory that the city held the water works as a private franchise and possession, and subject to all the responsibilities of private ownership. The judges who regarded it as a public work, held there was no liability. In *Conrad* v. *Trustees of Ithaca*, 16 N. Y., 159, the facts were substantially like those in *Rochester White Lead Co.* v. *Rochester*, and the decision was rested on the principles of that case. Denio, C. J., who delivered the opinion of the court, stated his own opinion to be, that there was no liability, but that he regarded the recent decision in another case referred to as establishing it, and in *Livermore* v. *Freeholders of Camden*, 29 N. J., 245 (and on Error, 2 Vroom, 507), under a statute like that which was considered by this court in *Township of Leoni* v. *Taylor*, it was decided that while a passenger over a bridge could sue for injuries, yet where property adjacent was injured by the bridge, there was no remedy. Upon anything which sustains the liability for such grievances however, it is manifest that the injury is not a public grievance in any sense, and does not involve a special private damage, from an act that at the same time affects injuriously the whole people.

Another class of injuries involves a public grievance specially injuring an individual, arising out of some neglect or misconduct in the management of some of those works which are held in New York, to concern the municipality in its private interests, and to be in the law the same as private enterprises. It is held, that in constructing sewers and similar works, which can only be built by city direction, if the streets are broken up and injuries happen because no adequate precautions are taken, the liability shall be enforced as springing from that carelessness, and not on the ground of non-repairs of highways. *Lloyd* v. *Mayor*, 5 N. Y., 369, and *Storrs* v. *Utica*, 17 N. Y. 104, were cases of this kind. In these cases, as in the case of *Detroit* v. *Corey*, the streets were held to have been broken up by the direct agency of the city authorities, and the negligence which caused the injury, was held to be negligence in doing a work requiring special care, or in other words, the wrong complained of was a misfeasance and not a mere omission. The case of *Weet* v. *Brockport*, 16 N. Y., 161, was also a case where Selden, J., who reviewed and discussed all the decisions, said it was not necessary to consider the wrong complained of as a mere neglect of duty, because it was in itself a dangerous public nuisance, created by the corporation, and not in any sense a non-feasance. In *Delmonico* v. *Mayor*, 1 Sand. 226, the injuries, though in a highway, consisted in crushing in a vault under the street, by improperly piling earth upon it while excavating for a sewer, and there was also a direct misfeasance.

The cases in which cities and villages have been held subject to suits for neglect of public duty, in not keeping highways in repair, where none of the other elements have been taken into the account, are not numerous, and all which quote any authority profess to rest especially upon the New York cases, except where the remedy is statutory. It will be proper, therefore, to notice what those cases are, and upon what cases they are supported. The only cases of this kind decided in the courts of last resort, that we have been able to find, are *Hutson* v. *Mayor*, 9 N. Y. 163; *Hickox* v. *Plattsburg*, 16 N. Y. 161, and *Davenport* v. *Ruckman*, 37 N. Y. 568. This latter case resembles the one before us very closely in its leading features, and would furnish a very close precedent. It is not reasoned out at all, but refers for the doctrine to the other two cases, and to an authority in 18 N. Y., which does not relate to municipal liabilities. The case of *Hutson* v. *Mayor*, does not attempt to find any distinct foundation for the right of action, but refers to the cases in 3 Hill, and *Rochester White Lead Co.* v. *Rochester*, and *Adsit* v. *Brady*, 4 Hill, 630, as having established the liability. This latter case is disapproved in *West* v. *Brockport*, and the others are sustained there on the ground of misfeasance, and as Judge Denio, when the decisions in 16 New York were made, stated that he had not supposed there was any corporate liability for mere neglect to keep ways in repair, it is quite possible that the case of *Hutson* v. *Mayor*, was regarded as distinguishable. The circumstances were very aggravated, as it would seem that the city had left a road too narrow to accommodate a carriage without any paving and without protection against the danger of falling down a deep embankment into a railroad excavation. The report is not as full as could be desired upon the precise state of facts. In the Supreme Court, where the judges differed in opinion (two dissenting), the liability seems, from the view taken of that case by Judge Selden, to have rested on the ground that there had been a breach of private duty and not of duty to the public. If this was the view actually taken, it would not bring the case within the same category with the other road cases. But the case of *West* v. *Brockport*, 16 New York, 161, is recognized as the one in which the whole law has been finally settled, and it is upon the grounds there laid down, that the liability is now fixed in New York. The elaborate opinion of Judge Selden, which was adopted by the Court of Appeals, denies the correctness of the dicta in some of the previous cases, and asserts the liability to an action solely upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter, and that the liability is the same as that which attaches against individuals who have franchises in ferries, toll-bridges, and the like. The principle as he states it, is:

"That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance."

In order to get at the true ground of liability, the opinion goes on to determine, first, whether townships and other public bodies, not being incorporated cities or villages, are liable, and shows conclusively that they are not, and the court arrives at this conclusion not on the basis of an absence of duty or an absence of means, but because their duties are duties to the public and not to individuals. Full citations are made from the English cases which were cited before us, and also from the American cases. The case of *Young* v. *Commissioners of Roads*, 2 N. and McC., 587, is cited approvingly, and the following language is quoted as expressing the correct idea: "When an officer has been appointed to act, not for the public in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered him, he may be responsible in a private action for a neglect of duty, but when the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution." In another part of the opinion, sheriffs are given as examples of the former and highway commissioners of the latter class of officers The cases cited do not all require the consideration for the services to come from individuals, but they all require the services to be due to individuals and not to the public, and to spring from contract. The English cases are reviewed in the *Mersey Dock Cases*, 1 H. of L. Cases, N. S., 93; 1 H. & N. 498; 3 Id. 164, and exemplify this. Thus the liability to repair a sea wall is in favor of those who own the property adjacent; the liability to keep docks safe of access in favor of those who have occasion to require their use upon the customary terms; the liability to keep toll bridges safe in favor of those who use them. But there is no instance of liability where the public is interested directly, and in those cases where the obligation rests upon the consideration of corporate franchises, the duty has always been towards individuals, although the consideration moved from the state. The decisions upon this sustain the views of Judge Selden concerning his premises, but there is some difficulty in reaching his conclusions through them. It is admitted everywhere, except in a single case in Maryland, that there is no common law liabaility against ordinary municipal corporations, such as towns or counties, and that they cannot be sued except by statute. It has also been uniformly held in New York as well as elsewhere, that public officers whose offices are created by act of the legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it unless it is authorized or ratified expressly or by implication. This doctrine has been applied to cities as well as to all other corporations. *Barney* v. *Lowell*, 98 Mass. 570; *White* v. *Philipston*, 10 Metc., 108; *Mower* v. *Leicester*, 9 Mass., 247; *Bigelow* v. *Randolph*, 14 Gray, 541; *Wolcott* v. *Swanscott*, 1 Allen, 101; *Young* v. *Com'r of Roads*, 2 Nott. & McCord, 537; *Pack* v. *Mayor*, 4 Seld., 222; *Martin* v. *Mayor of Brooklyn*, 1 Hill, 545; *Bartlett* v. *Crozier*, 17 J. R., 438; *Morey* v. *Newfane*, 8 Barb., 605; *Eastman* v. *Meredith*, 36 N. Y. 284; *Hyde* v. *Jamaica*, 27 Vt. 443; *Lorillard* v. *Town of Monroe*, 11 N. Y. 392; *Mitchell* v. *Rockland*, 52 Maine, 168—and the numerous cases which exonerate cities from liabilities for not enforcing their police laws so as to prevent damage, rest upon a very similar basis.—*Howell* v. *Alexandria*, 3 Peters, 398; *Levy* v. *Mayor*, 1 Sandf., S. C. 465; *Proctor* v. *Lexington*, 13 B. Monroe, 509; *Howe* v. *New Orleans*, 12 La. Ann., 481; *Western Reserve College* v. *Cleveland*, 12 Ohio St., 375; *Brinkmeyer* v. *Evansville*, 29 Ind., 187; *Griffin* v. *Mayor*, 9 N. Y. 456. In *Eastman* v. *Meredith*, 36 N. H., 284, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature, which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies. They may own private property and transact business not strictly municipal, if allowed by law to do so, just as private parties may, and with the same liability; but their public functions are all held at sufferance, and their duties may be multiplied and enforced at the pleasure of the legislature. They have no choice in the matter; they have no privileges which cannot be taken away, and they derive no profit from their care of the public ways and the execution of their public functions. They differ from towns only in the extent of their powers and duties bestowed for public purposes, and their improvements are made by taxation, just as they are made on a smaller scale in towns and counties. In the case of *Bailey* v. *Mayor*, 3 Hill, 538, it was intimated by Judge Nelson that the state could not compel the city to accept its charter, and in *Child* v. *Boston*, the fact that the sewerage system had been left to vote and been accepted, was held to make it a private and not a public matter. The sewer cases have, in several instances, gone upon this latter notion. It is not necessary to discuss that question here, because streets are not private and because in this state at least, no municipality can exercise any powers except by state permission, and every municipal charter is liable to be amended at pleasure. The charter of Detroit has undergone most radical changes. It is impossible to sustain the proposition that those charters rest on contract, and it is impossible as Judge Selden demonstrates, to find any legal warrant for any other ground for distinguishing the liability of one municipal body from that of another. There is no basis or authority for any such distinction concerning the consideration on which their powers are granted, and it rests upon simple assertion; and yet the decision stands in New York as authority for all that is claimed here, because although in the case in which the opinion was given in the Supreme Court, it was not called for, yet in the case of *Hickox* v. *Trustees of Plattsburg*, 16 N. Y., 161, in which it was adopted as the opinion of the Court of Appeals, the mischief was a mere neglect to repair, when the street had been obstructed by an individual excavation for a short time.

It is impossible to harmonize the decision with the previous decisions exempting corporations from responsibility, because public officers were not their agents. It is no easier to sustain it in the face of the uniform decisions denying liability for failure to enforce their police regulations. The authorities which make corporations liable on the ground of conditions attached to their franchises, go very far towards compelling them to respond as absolutely bound to prevent mischief, and the general reasoning on which most of the opinions rest, and the criticisms made upon former decisions—which it is asserted, went altogether too far in creating liability—all are designed to show, and do show very forcibly, that simply as municipal corporations apart from any contract theory, no public bodies can be made responsible for official neglect, involving no active misfeasance.

There is no such distinction recognized in the law elsewhere. In *City of Providence* v. *Clapp*, 17 Howard, 161, the United States Supreme Court, through Judge Nelson, held that cities and towns were alike in their responsibility and in their immunity. In *County officers of Anne Arundel* v. *Duckett*, 20 Md., 468, a county was held responsible to the fullest extent. In New Jersey in *Freeholders of Sussex* v. *Strader*, 3 Harrison, 108; *County Freeholders of Essex*, 27 N. J., 415; *Livermore* v. *Freeholders of Camden*, 29 N. J., 245, and 2 Vroom, 507, *Pray* v. *Mayor of Jersey City*, 32 N. J., 394, the cases were all rested on the same principles, and cities were exonerated because towns and counties were. The suggestion of Judge Selden has been caught at by some courts since the decision, and has been carried to its legitimate results, as in *Jones* v. *New Haven*, 34 Conn., 1, where the damage was caused by a falling limb of a tree. But so far as we have seen, even the cases which are decided on this ground, do not hold that towns do not receive their powers upon a consideration as well as cities. That question still remains to be handled in those courts.

It is utterly impossible to draw any rational distinction on any such ground. It is competent for the legislature to give towns and counties powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this, because the good government of the people is supposed to require it. It would be contrary to every principle of fairness, to give special privileges to any part of the people and then deny to others, and such is not the purpose of city charters. In England the burgesses of boroughs and cities have very important and valuable privileges of an exclusive nature and not common to all the people of the realm. Their charters are grants of privilege and not mere government agencies. Their free customs and liberties were put by the great charter under the same immunity with private freeholds. But in this state and in this country generally they are not placed beyond legislative control. The Dartmouth College case which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere which holds that either offices or municipal charters generally involve any rights of property whatever. They are all created for public uses and subject to public control.

We think that it will require legislative action to create any liability to private suit for non-repairs of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions of importance and some nicety. They cannot be solved by courts.

*Judgment reversed.*

Cooley, J., dissented.

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(Note by Editor of *American Law Review.*)

[The foregoing case is one that cannot fail to be of interest to the profession, inasmuch as it concerns an important question affecting a great number of our municipalities to a very large extent, and is, at the same time, a departure from the doctrines, which have been supposed to have been adopted by the English courts and those of some of the American States. The question is by no means free from difficulty; and we cannot fairly say that we have been able to devote sufficient time to an examination and analysis of the cases bearing upon the point, to enable us to speak confidently of the exact weight of authority against the decision here made. There seems to be no question, whatever, that the New York Courts have adopted a rule more in conformity with the dissenting opinion in this case than with that of the majority. In *Davenport* v. *Ruckman*, 87 N. Y., 568, the rule is thus stated: When the streets or sidewalks of the city of New York are out of repair through the neglect of the corporation, it is liable to an action for such neglect, at the suit of the person injured, whether the injury arises from some act done by the corporation, or from an omission of duty on their part. And the same doctrine is found in numerous earlier decisions in that state, most of which are referred to in the opinion in the case under review. The rule is thus stated in a late case in the Supreme Court of New York: "Whatever may be the case in regard to commissioners of highways in towns, a different and more stringent rule appears to have been applied to corporations and the trustees of a village:" *Hyatt* v. *The Trustees of the Village of Rondout*, 44 Barb., 385.

And in *Wendell* v. *The City of Troy*, 4 Keyes, N. Y. Court of Appeal, 261, the city was held responsible for an injury to the plaintiff, by means of the defective construction of a drain under the street, whereby it caved in, although built by a private person for his own convenience by permission of the city authorities. The New York cases seem to go the full length of making cities and villages responsible for all damage caused by any failure to perform the duties imposed by their charters, on the ground that having sought special acts of incorporation they are bound, as corporations, to the performance of all the duties imposed by such charters, as conditions voluntarily assumed by the corporations, impliedly at least, by reason of the acceptance of the charters containing such conditions. And the case of *Jones* v. *The City of New Haven*, 84 Conn. 1, seems to go much upon the same ground, except that there the matter came specially under one of their own by-laws, in regard to which there might seem to be less question than if the duty had been imposed by the legislature as a public duty or burden.

The general doctrine that a public officer is not responsible for the misconduct of his subordinates, although his appointees, has been recognized from an early day: *Lane* v. *Cotton*, 1 Ld. Ray. 646, where the action was against the postmaster general for the default of his deputies. The case of the *Mayor of Lime Regis* v. *Henley*, 8 B. & Ad. 77; S. C. 2 Cl. & Fin. 881, was an action for injury to the defendant's land by reason of the plaintiffs failing to repair certain sea walls appertaining to their municipality, and which the condition of their charter obliged them to maintain and keep in repair. The case was first decided by the Common Pleas, in favor of the present defendant, 5 Bing., 91, and came for hearing on writ of error in the King's Bench. Lord Tenterden, Ch. J., gave judgment for the defendant, upon the ground that the corporation by accepting its charter became bound to perform all its conditions, and whoever suffered damage through any default in that respect, may have an action and the public may have redress for such defaults by indictment.

The subject has been more or less considered by the English courts since that time; but the case of the *Mersey Docks* v. *Gibbs*, and the same v. *Penhallow*, 1 H. Lds. Cases, N. S. 93—128; S. C., 1 H & N. 489; 8 id. 164, seems to have put the question at rest there, so far as the points involved in the latter case are concerned. The injury complained of here occurred by reason of the docks being out of repair. The plaintiffs are a public corporation, created for the purpose of maintaining the harbor of Liverpool, and are required to maintain and keep in repair suitable docks and other harbor accommodations, for the use of which they are authorized to demand certain dues, which are intended to maintain the works, and are to be lessened whenever they produce more than is required for that purpose. The Court of Exchequer gave judgment in favor of the corporation, on the authority of *Metcalfe* v. *Hetherington*, 11 Exch. 258; but this judgment was reversed in the Exchequer Chamber; 8 H. & N. 164, and the judgment of the Exchequer Chamber affirmed in the House of Lords. The case of Gibbs was heard on demurrer to the declaration which contained the averment that the company knowing that the dock and its entrance was, by reason of accumulation of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damages arose in consequence.

The case in the Exchequer Chamber seems to have been decided upon the general ground that a corporation created for the purpose of maintaining public works, and receiving tolls or dues for the use of the same, is bound to see that such works are kept in a safe and fit condition for public use. This decision went upon the authority of *The Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & El. 223, 242. And it was here considered that it made no difference whether the tolls were reserved for the benefit of the shareholders, as in the last case cited, or in a fiduciary capacity, as in the present case. And the House of Lords seem to have decided the case upon this view. Lord Chanworth, Chancellor, said the destruction was one that could be held to affect the rights of those using the docks. Lord Wensleydale said, if the question were *res integra*, and not settled by authority, he would be inclined to hold that it came within the principle of the cases where public officers have been held not liable to a private action for neglect of duty by servants appointed by them. But upon the former decisions he held the judgment below must be affirmed. And Lord Westbury fully concurred with the Lord Chancellor.

And it seems to us that this case is in itself no sufficient authority for holding cities and villages any more responsible for their streets and sidewalks being out of repair than are towns or counties, upon whom the duty of keeping highways in repair is imposed, where it has been long settled there is no responsibility for injuries occurring by want of repairs, unless imposed by statute. But the earlier English cases held a more stringent rule of responsibility in regard to cities and villages having special acts of incorporation, and chiefly upon the ground that they had accepted them voluntarily, and thus assumed the duties imposed by the charters thus accepted. How far this distinction is well-founded, it will not be altogether decisive of the question to inquire. For, since it has been long settled that such corporations are so responsible, it might not be entirely just to the public to now declare their irresponsibility, when, but for the rule of responsibility already established, the legislature might have provided for such responsibility by special enactments, as in the case of towns. For while it may be reasoned with great plausibility that there is no good reason, aside from the former decisions, to hold cities and villages to any higher degree of responsibility in regard to damages occurring by reason of their highways being out of repair, than towns are held; it may at the same time be urged with great propriety that they should be held to the same responsibility. But under the decision here made they could not be so held in most of the States. Since the legislatures have omitted in most cases it is fair to presume, to impose the same duty by statutes upon cities and villages, which they do upon towns, on the ground that it is not required by reason of the general principles of the law having already imposed that duty upon them, this consideration will tend to show that the restoration of the law to symmetry in this particular will more conveniently come from the legislature than from the courts. Beyond this it does not occur to us that any very convincing argument can fairly be urged against the decision of the court in this case. It cannot, we think, as a general rule, be justly held that towns are any less responsible for the consequences of leaving the highway in an unsafe condition than cities and villages are. If it requires a special statutory enactment to impose any such responsibility upon towns, we do not, upon general principles, very well comprehend why it should not require the same in the case of cities and villages. Our only doubt would be whether the symmetry of the law upon this point might not better be restored by the legislature. I. F. R.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

### FOR MAY, JUNE AND JULY, 1870.

*(Continued from page 279.)*

Marriage Settlement.—*See* Confirmation, 2.

Married Woman.—*See* Husband and Wife.

Marshalling.—*See* Charge.

Master.—*See* Ship.

Misdescription.—*See* Codicil, 2; Construction, 5.

Money Had and Received.—*See* Action, 1.

Mortgage.—*See* Assignment; Charge; Notice, 2; Residuary Clause, 2.

Negligence.

1. The plaintiff was a gardener in the service of the defendant, and accompanied him in a buggy to do some work for him. While crossing a furrow, the kingbolt broke and the plaintiff was thrown out and injured. *Held*, that as the defendant was performing a gratuitous service for the plaintiff, the plaintiff could not recover in the absence of gross negligence, and that there was no evidence to establish gross negligence.—*Moffatt* v. *Bateman*, L. R. 3 C. P. 115.

2. The plaintiff, while attempting to cross the defendant's railway by a road which crossed it on a level, was knocked down and injured by an engine. Originally, gates were erected and a gate-keeper kept at the crossing, but for some years the defendants had ceased to employ a gate-keeper; there had been several accidents before, and attention called to the danger of the crossing. Three years before, the defendants obtained an act authorizing them to make a new road, and to discontinue so much of the old road as crossed their railway; five years were allowed for the exercise of the powers, but nothing was done until after the accident. *Held*, that there was no evidence of negligence on the part of the defendants, and that there was no obligation upon them to employ a gate-keeper or to divert the road.—*Cliff* v. *Midland Railway Co.*, L. R. 5 Q. B. 258.

*See* Proximate Cause; Towage.

Non-Access.—*See* Evidence, 4.

Non-User.—*See* Highway.

Notice.

1. By a settlement of a Baptist chapel it was provided that, when the church should have to consider the appointment or dismissal of a minister, a notice should be given of the meeting, publicly in the chapel on Sunday

morning, at least four days before the time of holding such meeting, and should expressly state the object thereof; and each decision made at such meeting should be reconsidered at a second meeting, to be convened by notice given in like manner, expressly stating the object thereof; and such decision should not be binding until confirmed at a second meeting. A meeting was called, by notice, "for the purpose of bringing charges against and considering the dismissal of" the defendant, and a resolution was there passed "that he is not a fit and proper person to occupy the position of pastor, and that his office as pastor cease forthwith." Notice of a second meeting was given "for the purpose of confirming and ratifying the resolutions passed at the church-meeting" aforesaid. At this meeting it was resolved that the minutes of the preceding meeting "be passed, confirmed and ratified." *Held*, that the second notice was invalid because it gave no intimation of the resolutions which had been passed and were to be reconsidered.—*Dean* v. *Bennett*, L. R. 9 Eq. 625.

2. In a mortgage deed it was provided that if the mortgagor should make default, "then immediately or at any time after such default," he should hold the mortgaged premises as yearly tenant to the mortgagees at a certain rent, and that they should have the same remedies for recovering the said rent as if reserved upon a common lease. Default having been made, the mortgagees gave no notice of their intention to treat the mortgagor as a tenant, but at the end of a year distrained for the rent. *Held*, that notice to the mortgagor was necessary before the mortgagees could treat him as a tenant.—*Clowes* v. *Hughes*, L. R. 5 Ex. 160.

*See* Bills and Notes; Injunction; Insurance, 4.

Novation.

A. effected a policy with the X. Co in 1852 for one year, premium down, and then if he should pay the same premium every year until his death, the company was to remain bound. He paid yearly until, in 1857, the X. Co. made over its business to the Z. Co., notified A. that the Z. Co. would be responsible on the policy instead of the X. Co.; and requested him to pay future premiums to the Z. Co., and to have his policy indorsed by it. A. paid as requested, and accepted a bonus from the Z. Co., but did not have his policy indorsed. *Held*, that A. had accepted the Z. Co. as his debtor in place of the X. Co.—*In re Times Life Assurance and Guarantee Co.*, L. R. 5 Ch. 381.

Obstruction.—*See* Ancient Light; Criminal Law.

Perpetuity.—*See* Remoteness.

Power.—*See* Appointment; Election.

Practice.

At a trial, the issue was whether the defendant executed a policy of insurance. Notice to produce having been given to the defendant, the plaintiffs proposed to prove its execution by tendering an unstamped document purporting to be a copy which they had received from the defendant's broker. The defendant contended that, before admitting the copy to be read, the judge should hear evidence and decide whether an original stamped policy was executed. *Held*, that as the objection was not a mere stamp objection, but went to the foundation of the cause of action, it was a question for the jury, and not for the judge —*Stowe* v. *Querner*, L. R. 5 Ex. 155.

Principal and Agent.

1. F. and four others, being joint owners of an estate, offered it for sale by an advertisement, intimating that applications "to treat and view" were to be made to F. (among others). *Held*, that this gave F. no authority to enter into a contract for the sale of the estate.—*Godwin* v. *Brind*, L. R. 5 C. P. 299 *n.* (1).

2. Action by a broker for non-acceptance of cotton. The bought note given by the plaintiff to the defendant stated, "I have this day sold you on account of T., &c. E. F., broker." *Held*, that a broker cannot maintain an action in his own name on a contract made by him as broker.—*Fairlie* v. *Fenton*, L. R. 5 Ex. 169.

3. The defendants signed a contract in the following form: "Sold A. J. Paice, Esq., of London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig), &c. (Signed) Walker & Strange." *Held*, that the defendants did not show in the body of the contract an intention not to bind themselves as principals; and that by signing it without words importing agency they rendered themselves liable.—*Paice* v. *Walker*, L. R. 5 Ex. 173.

4. M. gave to a company the name of L as an applicant for shares, and a number were allotted to L. and his name placed on the register. Afterwards, at the request of M., L. sent him a letter of application for shares. M. paid the allotment money, and received the divident on the shares. *Held*, that L.

had constituted M. his agent, and that his name was properly placed on the list of contributories.—*In re International Contract Co.; Levita's Case*, L. R. 5 Ch. 489.

*See* Evidence, 3; Warranty.

Privileged Communications. — *See* Equity Pleading and Practice, 2.

Probable Cause.—*See* Reasonable and Probable Cause.

Production of Documents.—*See* Discovery; Equity Pleading and Practice, 2.

Proximate Cause.

The defendants' vessel, by the negligence of the captain and crew, ran aground, and, as there was a high wind blowing at the time, was driven against the plaintiff's sea-wall and damaged it. *Held*, that the negligence of the defendants' servants was the proximate cause of the damage, and that the defendants were liable.—*Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204.

Racing Debt.

Certain betting creditors of the Marquis of H. threatened to post him at Tattersall's as a defaulter unless he paid the bets which he had lost on horse-races; the consequences of their doing so would have cost him a large sum of money. To prevent this he gave a bond for £10,000, which they accepted. *Held*, that the bond was valid, and could be proved against his estate.—*Bubb* v. *Yelverton*, L. R. 9 Eq. 471.

Railway.—*See* Criminal Law; Negligence, 2; Receiver.

Rape.—*See* Indictment.

Reasonable and Probable Cause.

False imprisonment. The defendant's rifle was stolen, and his servant said to the plaintiff in the presence of R. that there was a row about it, and that R. had seen it in the plaintiff's barn. The plaintiff denied this, and took them to his barn and showed them a gun, which he said was the one seen by R. R. said it was not the gun he had seen before. This was repeated by the servant to the defendant, who gave the plaintiff into custody; he was tried and acquitted. The defendant did not see R. before causing the plaintiff to be arrested. The judge directed the jury that the defendant had acted on hearsay evidence, and therefore without probable cause. *Held*, that the information obtained by the defendant from his servant did constitute reasonable and probable cause; also that what is reasonable and probable cause is a question to be determined by the judge.—*Lister* v. *Perryman*, L. R. 4 H. L. 521.

Receiver.

A railway company agreed to purchase some land, and took possession. The vendor obtained a decree ordering specific performance, and declaring him entitled to a lien for the purchase-money. The company became insolvent, and the vendor obtained an order that the land should be sold, and that until such sale or the payment of the purchase-money the company should be enjoined against running any engine over, or otherwise using or continuing in possession of the land. *Held*, that the injunction was improper, as it rendered the land useless; and that a receiver should be appointed with a direction to the company to give him immediate possession; *held, also*, that the land, when sold, would be free from all claims of the public to a right of way.—*Munns* v. *Isle of Wight Railway Co.*, L. R. 5 Ch. 414.

Remainder.—*See* Residuary Clause, 1.

Remoteness.

Trustees were directed to pay and divide certain property, after the death of the testator's wife, equally between all his children then living and such issue then living of his children then deceased as should attain the age of twenty-three years. *Held*, that this bequest was void for remoteness.—*Smith* v. *Smith*, L. R. 5 Ch. 342.

Representation.—*See* Appropriation.

Residuary Clause.

1. A testator, by will dated 1832, gave and devised all his freehold estates to his five daughters as tenants in common, for their respective lives, remainder to trustees and their heirs during the lives of his daughters *respectively*, upon trust to reserve contingent remainders; and after the decease of either of his said daughters, then as to the one-fifth share of the daughter so dying, to the use of all the children of such daughter, who had attained or should attain the age of twenty-one, in equal shares, and to their heirs and assigns but if there should be no such child who should attain said age, then to the use of his other daughters in equal shares for their respective lives, with remainder to their children in fee. After certain other bequests, as to all the rest, residue, and remainder of his estate and effects, he gave and bequeathed the same to the same trustees, their heirs, executors, administrators, and assigns, upon trust to lay out and invest the same with power to alter the investments, and to hold said residuary estate upon the same trusts as had been declared with respect to his real estate. The

testator died in 1834. One of his daughters died in 1851, leaving only one son, W., who attained the age of twenty-one in 1860. In a suit upon the same will, *Holmes* v. *Prescott*, 12 W. R. 686, it was *held*, that the devise of the freeholds to the children of the daughters was a contingent remainder, which in the case of W. failed owing to the failure of the particular estate; and that the bequest of personal estate upon the same trusts did not fail, and that W. took one-fifth of the residuary personal estate. *Held*, that the second limitation of the same share in the freehold estate to the other four daughters was also a contingent remainder; and that it was devised by the residuary clause to the trustees.—*Perceval* v. *Perceval*, L. R. 9 Eq. 386.

2. A testatrix devised and bequeathed all the residue of her property to her four children, to be equally divided between them She was mortgagee in fee of an estate which was sold after her death under a power of sale in the mortgage, but the purchaser refused to complete the purchase unless the residuary devisees joined in the conveyance. *Held*, that the intention of the testatrix was to give by will the property of which she was beneficial owner, and the legal estate in the mortgaged property passed to her heir-at-law.—*Martin* v. *Laverton*, L. R. 9 Eq. 563.

Reverter.

By virtue of an Act of Wm. III. certain land belonging to the corporation of Liverpool was taken by the parish for a church-yard, and by the sentence of consecration the corporation renounced all right and title to the church-yard, which was used as a burial-ground until it was closed by an Order in Council in 1854. In 1866, the corporation, being authorized to take part of this land for widening the street, gave the usual notice to treat to the incumbent, ordinary, and patron, and the incumbent made a claim to compensation. The question was referred, and a sum awarded as compensation, but the corporation refused to pay, claiming that the land reverted to them when it was closed against burials. *Held*, that the Act of Wm. III., followed by the act of consecration, forever excluded the corporation from any right in the land. *Held, also*, that the notice to treat was not an admission that the property must be paid for, but left that question open.—*Campbell* v. *Mayor and Corporation of Liverpool*, L. R. 9 Eq. 579.

Revivor.

A bill was brought by two persons, one claiming to be tenant for life of an estate, and the other to be tenant in fee of one-third, subject to the life-estate of the first, praying for an injunction against a defendant who claimed by an adverse title. The tenant for life, one of the plaintiffs, having died, it was *held*, that the other plaintiff was entitled to go on with the suit without a bill of revivor.—*Wilson* v. *Wilson*, L. R. 9 Eq. 452.

Revocation.—*See* Election.

Sale.—*See* Insurance, 1; Principal and Agent, 2, 3.

Separate Property.—*See* Husband and Wife, 1; Wife's Separate Estate.

Settlement.

1 In making a settlement of wife's property, courts of equity will not interfere with the husband's legal rights more than is necessary to make provision for the wife and her children by the present or any future marriage, and after that the fund ought to go back to the husband, whether he survives her or not.—*Croxton* v. *May*, L. R. 9 Eq. 404.

2. Three sisters were joint tenants in fee of a reversion. In their respective marriage settlements it was recited: that upon treaty for the marriage it was agreed that the property, as well real as personal, to which the intended wife "is entitled and may be entitled," should be settled in a certain manner, and that it was further agreed that the intended husband should enter into a covenant for settling it for the purposes aforesaid; and the indenture witnessed that the intended husband covenanted with the trustees that all the estate of which the intended wife "is now seised and possessed, or of which she shall hereafter become seised and possessed," should be settled. No other settlements were made, and the sisters and their husbands all died before they became entitled to possession. *Held*, that it was the intention that the property should be settled, and that the joint tenancy was thereby severed.—*Caldwell* v. *Fellowes*, L. R. 9 Eq. 410.

*See* Charge; Class; Confirmation, 1; Construction, 9; Investment.

Ship.

Beans were shipped by the plaintiffs on the defendants' vessel, to be carried under a bill of lading from Alexandria to Glasgow. At Liverpool the vessel was damaged by a collision, and the beans were saturated with salt water. The vessel was ready to proceed on her voyage in a few days, but nothing was done to dry the beans or prevent further damage to them. The plaintiffs protested against their being carried on in such condition, and offered to receive them at Liverpool, paying freight *pro rata*, but the defendants refused to deliver them without payment of full freight; they therefore carried them to Glasgow, where they were sold at great loss. *Held*, that the defendants had no right to insist on carrying on the beans in such a condition that they would deteriorate on the voyage, in order that they might earn freight, and their doing so rendered them liable for the damage.—*Notara* v. *Henderson*, L. R. 5 Q. B. 346.

*See* Collision; Foreign Judgment; Towage.

Specific Performance.

1. An agreement was made between a husband and the father of the wife, and executed by them and the wife, that the husbond and wife should live apart, and that the husband would execute a deed of separation, to contain all usual and proper clauses, and to secure £40 a-year for the maintenance of the wife and child. Specific performance decreed.—*Gibbs* v. *Harding*, L. R. 5 Ch. 336; s. c. L. R. 8 Eq. 400; 4 Am. Law. Rev. 471.

2. The plaintiffs leased to the respondents a coal mine for £720 and a royalty upon the coal gotten; the respondents covenanted to work the mine uninterruptedly, efficiently, and regularly (except in the event of strikes of workmen or other casualties), according to the usual or most approved practice. The respondents raised only a small quantity of coal. *Held*, that the lessees were not obliged to work the mine at all, but if they did work it they must do so efficiently; also, if their covenant did require them to work it on a larger scale the plaintiffs would have no remedy in equity.—*Wheatley* v. *Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538.

Statute.—*See* Charge; Construction, 2.

Statute of Frauds.—*See* Damages.

Sunday.—*See* Construction, 2.

Telegraph.—*See* Damages.

Title.

The plaintiff owned two adjoining houses in London, and sold one to the defendants by a conveyance which correctly marked out the ground site of the house conveyed. One of the rooms on the first floor of the plaintiff's house projected into the defendant's house. *Held*, that the plaintiff owned only the space filled by the projection; the column of air over it belonged to the defendants.—*Corbett* v. *Hill*, L. R. 9 Eq. 671.

Towage.

A tug towing a barque up the Thames, ported her helm in order to cross the bows of a brig which was on the port tack beating up the river; the tug passed ahead of the brig, but the stern of the barque struck the brig amidships. A licensed pilot was in charge of the barque, but gave no orders before or after the tug ported her helm; if he had given the proper order, the collision would have been avoided. *Held*, that the neglect of the pilot contributed to the accident, and that the tug was not liable to the owners of the barque for the damages occasioned by the collision.—*The Energy*, L. R. 3 Ad. & Ecc. 48.

Trust.

A testator left all his property to trustees, and directed them to lay out and invest £15,000 in government, real, or personal security, or in such stocks, funds, or shares, as they might in their absolute discretion think fit, and to pay the income to his wife for life, and after her death to divide the capital among his children. By an arrangement between the widow and trustees, £15,000 was set apart for her benefit for life, part of which was invested in railway stock bearing seven and four and a-half per cent. interest. At the death of the widow the stock was greatly depreciated in value. *Held*, that the trustees should have invested in permanent securities, and it was evident from the rate of interest that these investments were not permanent; therefore the appropriation was invalid, and there must be an appropriation of £15,000 for the children.—*Stewart* v. *Sanderson*, L. R. 10 Eq. 26.

*See* Insurance, 1.

Ultra Vires.

A memorandum of association mentioned among the objects of a company, "the making of purchases, investments, sales, or any other dealings," in shares of all joint-stock companies, and any other property; and power was given to the directors to accept the surrender and forfeiture of any shares from any member on such terms as they might think fit; and to let, mortgage, sell, or otherwise dispose of any property of the company, and accept payment in shares, or partly in shares and partly in cash, or in any other manner. The directors, in order to keep up the price of the shares of the company, purchased shares in the market. *Held*, reversing the decision of the Master of the Rolls, that the company had no power to purchase its own shares, and that such purchase was *ultra vires*.—*In re London, Hamburg, and Continental Exchange Bank; Zulueta's Claim*, L. R. 5 Ch. 444.

VENDOR AND PURCHASE OF REAL ESTATE.—*See* DAMAGES; PRINCIPAL AND AGENT, 1; RECEIVER.

VOLUNTARY CONVEYANCE.—*See* CHARGE.

WAGER.—*See* RACING DEBT.

WAIVER.—*See* CONFIRMATION.

WARRANTY.

Two directors of a mining company notified the company's bank by a letter that they had authorized C. to draw cheques on account of the company. The company's account was then overdrawn, and the bank, on the faith of the letter, honored the cheques so drawn by C. In fact C. had no such authority, but no fraud was charged. *Held*, in an action by the bank against the two directors, that there was an implied warranty on the part of the directors that C. had authority to draw cheques upon which an action of assumpsit would lie. —*Cherry* v. *The Colonial Bank of Australasia*, L. R. 3 P. C. 24.

WASTE.

Certain real estate was devised to Richard B. for life, remainder to his first and other sons successively in tail-male, remainders to William B., Thomas B., and J. L. W., successively for life, and their first and other sons in tail-male, remainder to the heirs of the testator. Richard B. entered and took the profits during his life, and died without issue. By his will, he devised his real estate, which included the reversion in fee, to William B., whom he appointed executor. William B. took the profits during his life, and died without issue, appointing the defendant executor. The bill was brought by Thomas B., and alleged waste by Richard B. and William B., the first two tenants for life, and prayed for an account and payment. It was found by the court that during their lives there had been inconsiderable cuttings of wood not timber on the estate. *Held*, that a remainder-man, who is not entitled to an immediate estate of inheritance in remainder, can maintain a bill for waste where there is fraudulent collusion between the tenant for life and the owner of the inheritance; but where the tenant for life and remainder-man are the same person, the acts must be such as would amount to fraud and collusion had there been two persons.—*Birch-Wolfe* v. *Birch*, L. R. 9 Eq. 683.

WAY.—*See* COMMITMENT; HIGHWAY; RECEIVER.

WIFE'S SEPARATE ESTATE.

Real estate was conveyed to the use of a married woman for her own separate use and benefit exclusive of her husband, and she by a written agreement demised it to the defendant. *Held*, that in equity the defendant was entitled to protection against any interference of the husband.—*Allen* v. *Walker*, L. R. 5 Ex. 187.

*See* HUSBAND AND WIFE, 1.

WILL.

1. A testatrix gave property "in trust for such of M. P.'s own family or next of kin, and in such parts as M. P. should appoint." M. P. appointed a share to her grand-niece. *Held*, that the word "family" was not confined to the statutory next of kin, and would include a grand-niece.—*Snow* v. *Teed*, L. R. 9 Eq. 622.

2. A testator devised lands to trustees to the use of Robert Gillett, the fourth son of George Henry Gillett, and his heirs, in case he should attain the age of twenty-one years; but if he should die under that age, then to the use of the fifth son and his heirs, in case he should attain the age of twenty-one; if he should die under that age, then to the first son after the fifth who should attain twenty-one. George Henry Gillett had seven sons; Robert Henry Gillett was the third, and John William Gillett the fourth, and both attained twenty-one. *Held*, that Robert was the one intended to take, although erroneously described as the fourth son; and if he had died under twenty-one the estate would have gone to the son next in order of birth.—*Gillett* v. *Gane*, L. R. 10 Eq. 29.

3. Bequest by testator upon trust for his daughter for life, and after her death, if she shall leave issue, unto such, her issue, share and share alike, if more than one, when and so often as they shall severally attain twenty-one, and to apply the dividends meanwhile for their maintenance. His daughter had four children, and all attained twenty-one; three died before her, and one survived. *Held*, that the gift to the issue was intended for such only as survived the daughter, and that the one survivor took the whole.—*In re Watson's Trusts*, L. R. 10 Eq. 36.

4. Testator gave all his property, real and personal, to his wife, so long as she should continue his widow, and upon the decease or second marriage of his wife he gave his real and leasehold estates, and his personal estate and effects then remaining unconsumed, to his children and their heirs, with the proviso that, if all his children should die "before attaining a vested interest" under the will, then the property should go in equal shares to the next of kin of the testator and next of kin of his wife. The testator left one son, who died a bachelor. The wife afterwards married and

died. *Held*, that the words "vested interest" were not used by the testator in their technical sense, and that his son did not take a vested interest under the will.—*Greenhalgh* v. *Bates*, L. R. 2 P. & D. 47.

5. H. executed a will disposing of his property in Tasmania; he subsequently executed another will disposing of his property in England, and confirming his former will. *Held*, that the two constituted but one will, and should be proved together.—*Goods of Harris*, L. R. 2 P. & D. 83.

6. Testator executed a will in India which was deposited in a bank there. Afterwards he executed a codicil in England, in which was this clause: "Of which will I, along with this codicil thereto, execute a copy, and homologate and confirm the same in all particulars, except in so far as altered or revoked by this codicil." At the execution of the codicil he showed the witnesses a copy of the will. *Held*, that the copy of the will shown was incorporated in the codicil.—*Goods of Mercer*, L. R. 2 P. & D. 91.

7. A Scotchman, domiciled in England, and having estates in England and Scotland, made, according to the law of Scotland, a "trust disposition and settlement" of his Scotch estate, which was revocable. In his will he recited and confirmed the settlement, and gave the residue of his real and personal estate to trustees to sell, and out of the proceeds to pay and discharge all his just debts and legacies. Afterwards he borrowed of trustees £14,000, in which he had a life-interest, and gave them as security a heritable bond charging the debt on the Scotch estate. By the law of Scotland, the Scotch estate thus charged was primarily liable to discharge the debt. *Held*, that the provision in the will to pay all debts, included the debt charged on the Scotch estate, and that the residuary estate must discharge it.—*Maxwell* v. *Maxwell*, L. R. 4 H. L. 506.

*See* Ambiguity; Codicil; Construction, 3-8; Cy Pres; Devise; Election; Evidence, 1; Remoteness; Residuary Clause, 1, 2.

Words.

"*Buildings.*"—*See* Covenant, 1. "*Cargo.*"—*See* Contract, 1. "*Family.*"—*See* Will, 1. "*Obstruction.*"—*See* Criminal Law. "*Obtain.*"—*See* False Pretences. "*Seller by retail of wine.*"—*See* Covenant, 2. "*Treat and view.*"—*See* Principal and Agent, 1. "*Vested Interest.*"—*See* Will, 4. "*Warrant, Authority, or Request*"—*See* Forgery. "*Younger sons.*"—*See* Class.

## REVIEWS.

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### Harrison's Common Law Procedure Act. Second Edition. Copp, Clark & Co., 1870.

Six parts of this invaluable work have been issued. The next part, which will contain the Index, Table of Cases cited, &c., will complete the labours of the author.

The first edition had become of little use for ready reference, owing to the changes affected by subsequent legislation, nor of course does it contain the recent cases; and though without that which the first edition had taught us to look upon as a necessity for so long a time, the practising lawyer had not succeeded, as is sometimes the case under such circumstances, in doing without it, and every day he looked forward for the new edition (as we now do for the Consolidated Digest which Mr. Robinson is preparing). It will be like re-establishing an old land-mark to have the new volume bound and complete on our shelves.

From what we have seen of it so far, it is evident the author has spared no pains to make it as reliable as the first edition, and it will be more complete and full, not only as to the number of acts annotated, but as to the cases referred to. We shall speak of it again when the last part has been issued.

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The education of the Roman youth was, under the republic, deemed incomplete until he committed to heart, and thoroughly understood, the twelve tables constituting the fundamental law of his country. The individuals who control our public school system deem a knowledge of the law of the land of so little use that its principles are not, even in a remote manner, brought to the notice of the school children of to-day. Reading and writing imperfectly acquired, with a dim and hazy comprehension of arithmetic and geography, make up the fundamental culture gained in the common schools, and the scheme of education is rendered complete by an accurate understanding of that least practical of all abstract sciences, English grammar. That our public school system has many excellent features cannot be denied, but its main object seems to have been lost sight of. That object is not to produce great linguists or men cultivated in literature or profound in science, but to so train the citizen that he may better perform the duties appertaining to his citizenship. Without neglecting those fundamental acquirements which are necessary conditions of all knowledge, the educational scheme of a common school should make provision for a study of the laws of the society within which it has its existance, and not, while pretending to impart to its pupils all necessary knowledge, keep them wholly ignorant of their duties and their rights as members of that society.—*Albany Law Journal.*

## DIARY FOR DECEMBER.

1. Thur. Paper Day, C. P. Clerk of every Municipality except Counties to return number of resident rate-payers to Registrar General. Re-hearing Term in Chancery commences.
2. Frid. New Trial Day, Q.B.
4. SUN. *2nd Sunday in Advent.*
5. Mon. Last day for notice of trial for County Court. Paper Day, Q.B. New Trial Day, C.P.
6. Tues. Paper Day, C.P. New Trial Day, Q.B.
7. Wed. New Trial Day, C.P.
9. Frid. New Trial Day, Q.B.
10. Sat... Michaelmas Term ends.
11. SUN. *3rd Sunday in Advent.*
13. Tues. General Sessions and County Court Sittings in each County.
14. Wed. Grammar and Common School assessment payable. Collector's roll to be returned unless time extended.
18. SUN. *4th Sunday in Advent.*
19. Mon. Nomination of Mayors in towns, Aldermen, Reeves, Councilmen, and Police Trustees.
24. Sat... Christmas Vacation in Chancery commences.
25. SUN. *Christmas Day.*
26. Mon. *St. Stephen.*
27. Tues. *St. John Evangelist.*
28. Wed. *Innocents Day.*
31. Sat. Last day on which remaining half General Sinking fund payable. School returns to be made. Deputy Registrar in Chancery to make return and pay over fees.

THE

# Canada Law Journal.

DECEMBER, 1870.

## RETAINERS AND RETAINING FEES.

### (FIRST PAPER.)

In Bouvier's Law Dictionary the definition of the legal term "*to retain*" is this: "To engage the services of an *attorney*, or *counsellor*, to manage a cause, at which time it is usual to give him a fee called the retaining fee." According to Wharton's Law Lexicon "the retaining fee" is "a preliminary fee given to a *counsel*, along with the retainer, in order to ensure his advocacy." These definitions by American and English authors, respectively, mark the difference between American, and we may add Canadian, and English law on the subject of retainers. We propose to say a few words about retainers and retaining fees: first, in so far as barristers are concerned, and then, so far as pertains to attorneys and solicitors. A great deal of doubt exists upon the precise meaning and effect of a retainer as regards counsel, and this is chiefly occasioned by the fact that questions of disputed retainers are seldom referred to, and seldom, if ever, adjudicated upon by the court. The settlement of such matters is invariably left in the hands of the barristers themselves, and usually one of Her Majesty's counsel is called in to arbitrate upon any question of conflicting retainers. In Ireland, the rules upon the subject were adjusted at a general bar-meeting in 1864, but we are not aware of any similar settlement touching this code of professional etiquette by the English or Canadian bar. We find references to the subject of retainers occasionally cropping up in the reports, and by the light of these and other guides, we shall seek to set forth the commonly received understanding of the profession thereupon.

A retainer may be either *general* or *special*: that is, it may have reference to all suits and causes in which the client shall be a party in every court wherein the counsel retained practises, or it may be limited to some particular cause against the client, and usually one in which proceedings have been already instituted. A general retainer is prospective in its character; not so the special retainer. On the part of the counsel, an acceptance of the retainer implies that he engages to assist the client with his advocacy; on the part of the client, the retainer amounts to an undertaking that he will send a brief to the barrister retained. The barrister cannot pick and choose his retainer, but is bound to accept any general retainer proffered, and he is also bound to accept any special retainer, provided always that he has not been previously retained, generally or otherwise, for the opposite party.

Some transactions, commonly supposed to amount to retainers, are not so really. For instance: the getting counsel's opinion on a case before the commencement of proceedings is not a retainer in such action when it is brought. The employment of the barrister here is simply as chamber counsel. Again: the getting counsel to draw pleadings does not involve a retainer in the suit or action. The barrister's employment in this instance is merely that of a draughtsman. And similarly, as to advising upon evidence. The very eminent counsel who appeared in *Earl Cholmondely* v. *Clinton*, during argument, stated the rule thus: "a counsel advises on pleadings, not being retained, and is the next day retained on the opposite side, and may then advise for such opposite party:" G. Coop. 80 S.C. 19 Ves. 261, and the court confirmed this representation made at the bar.

There are other practices as to retainers, which called down the reprobation of Sir

Samuel Romilly, such as retainers without the intention to send a brief, unless the opposite party sends one; and *intermittent* retainers where an occasional brief during the progress of the cause is contemplated. "*Retainers to your friends; briefs to your enemies*" is a beggarly device, whereby it is hoped to neutralize the power of those counsel, whose opposition is dreaded, but whose advocacy clients are unwilling to remunerate. Where there is a retainer but no brief, the understanding appears to be this: if the client, through inadvertence, omits to send a brief, and a brief is tendered by the opposite party, the client should be notified that he may repair the oversight; if however, the omission is deliberate and intentional, the brief of the opposite party can be accepted at once, and without notice. See *Ex p. Lloyd*, Mont. R. 74 *n*, and Brunker's Digest, 258. In the case cited, Lord Eldon, sitting as "*amicus curiæ*," in effect declared that a barrister is bound to act for the party by whom he is retained, so long as his services are required, but no longer: if a barrister receives the usual retainer at the commencement of a suit, and acts repeatedly as counsel thereunder, and, afterwards a general retainer is sent him on the other side, which is followed up by a brief for the next motion, no brief for that motion being sent by the side originally retaining him, he should accept such brief.

These observations, however, must be subject to certain considerations which professional delicacy can alone regulate, and which are thus stated by Lord Eldon. "The practice of the bar in my time, was this: If a retainer was sent by a party, against whom the counsel had been *employed*, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client, stating the circumstance, and giving him the option. That has, I believe, been relaxed; and the course now is as it has been represented at the bar. I do not admit he is *bound* to accept the new brief. My opinion is, that he ought not, if he knows anything that may be prejudicial to the former client, to accept the new brief, though that client refused to retain him." *Earl Cholmondely* v. *Clinton*, 19 Ves. 274, 275.

The last cases reported, in which the courts have declined to interfere in questions of retainer, are *Baylis* v. *Grant*, 2 M. & K. 316; and *Ex p. Elsee*, Mont. R. 70. In *Lucas* v. *Peacock*, 8 Beav. 1, it is queried whether a retainer ceases upon the counsel being appointed one of Her Majesty's counsel.

In our next paper we propose to discuss some points connected with a solicitor's retainer.

## OBSTRUCTIONS.

We feel sure many readers of the *Law Journal* will share the gratification we experience in noticing a recent decision of the Court of Queen's Bench in the case of *The Queen* versus *Plummer*, argued during last Michaelmas Term.

It was an application to quash a conviction made by the Police Magistrate of London, Ontario, in the case of one Plummer, who was held to have contravened a city by-law in riding a velocipede along the sidewalk. The by-law in question provided—

> "That no person shall, by any animal, vehicle, lumber, building, fence, or other material, goods, wares, merchandize, or chattels, in any way encumber, obstruct, injure, or foul any street, square, lane, walk, sidewalk, road, bridge, or sewer now being or hereafter to be laid out and erected, (except as hereinafter provided with respect to buildings)."

It was urged by counsel for the defendant that the word "obstruction" means something of a permanent nature, and does not apply at all to a velocipede in motion, which takes up no more room than a single person. But Adam Wilson, J., in discharging the rule remarked—

> "A velocipede, I should say, may be an obstruction or encumbrance on a sidewalk. All that has to be done is to give the words a reasonable latitude in interpretation, just as we have to do when we use them. Now, to ordinary comprehension, a horse, or a waggon, or a drove of sheep or oxen, driven along the sidewalk, would be understood to be an obstruction or encumbrance to the legitimate use of it by those desirous of using it.
>
> I understand this language off the Bench, though not the most exact or scientific, and I do not know why I should not understand it as sufficiently precise for the purpose on the Bench; and I understand it to mean, that whoever, by any of the means described in the by-law, prevents foot travellers from the free, safe, and convenient use of side-walk, offends against the enactment."

In support of this view his Lordship cited the words of the Vagrant Act (32–33 Vic. cap 28, Ca.):

"All persons loitering in the streets or highways, and *obstructing* passengers by standing across the footpaths, or *by using insulting language*, or in any other way, shall be deemed vagrants."

We trust this decision may give the *coup de grace* to the velocipede mania, now fast disappearing, but which for a short time made our streets a theatre for the acrobatic displays of aspirants after bycycular notoriety. It only remains for some philanthropist to carry the matter a little farther, and invoke judicial authority for the suppression of those terrible "obstructions," the perambulators which careless nursemaids propel so skillfully against the sensitive tibiæ of unwary pedestrians. We congratulate the London magistrate on the result of the argument, and invite him to "carry the war into Africa," and head a crusade against the "perambulator-propellers" as well as the "velocipedestrians."

## JUDICIAL SENTIMENTS.

We cannot forbear to notice the following very remarkable passage in a speech delivered by Mr. Lawrence, the Chief Justice of the Supreme Court of Illinois, in reply to an address presented to him by the Law Institute at Chicago, on its recent opening. After saying (the *Chicago Legal News* is our authority) that the Bench, if cordially supported by the Bar, could "calmly face any degree of popular passion or partisan clamour, trusting its vindication to the bar, and strong in the conviction that the upright magistrate will certainly be honored in the end by the very community whom his judgments may have offended," he says:

"But a better and deeper reason than this can be given why the bench and bar should keep fully alive the sentiment of brotherhood. It is a fact which cannot be denied that, as a people, we are undergoing rapid deterioration. Our social, political and commercial morals are sinking to a lower and lower grade. We are no longer content with the acquisition of wealth by patient toil, to be when won, as wisely expended as it has been honestly earned. A fevered and insane passion for money has gained possession of the minds of men, and at this moment, is doing more to corrupt our national life than all other causes united. This maddening love of gold, to be expended, not in the modes which shall make American life the highest development of modern civilization, but in coarse and barbaric display, or what is still worse, in the ways that lead to the debasement of public morals, is leading us, as a nation, down the dance of death. Corruption has become a systematic and almost shameless means of power, and contemporary events at times recall the period when the Roman Empire entered upon its swift descent to ruin. Wise men begin to doubt the ultimate success of our institutions, and already proclaim that in the metropolitan city of the continent, republicanism, as an instrument of municipal government, stands a confessed failure; day by day we seem to be drifting further and further from our ancient anchorage toward an unknown coast whose atmosphere is laden with poison and death.

That it is in the power of the bench and bar of the country, unaided, to arrest the downward tendency of the times, is not to be supposed. Nevertheless we can do something, and, if properly aided by other conservative elements of society, can do much to check it. We can, at least, make a noble struggle, and be the last to fall. Common as it is to utter vapid witticisms in disparagement of the bar, the well-known truth, nevertheless is, that the men who, in better times, have done most to create and mould our political institutions and control the social forces of the country, have belonged to the profession of the law. If you, gentlemen of the bar, can constantly live up to the highest and noblest traditions of professional life; if you can keep ever fresh and bright the sentiment which doubtless now animates you, that the true ambition of the lawyer is not the acquisition of wealth, but of that pure professional fame which is to be won by the exercise of your high vocation in a spirit of the most punctilious honour, and with an ever present consciousness that you, as well as the court, are ministers at the altar of Justice; and if the various judicial tribunals of this state shall so perform their duties as to command the confidence and support of such a bar, shall be so clear in their high office that not even a disappointed litigant can venture to charge them with unholy motives—then the judiciary and the bar standing together, will, in the future, as in the past, furnish a sure protection against wrong, and keep alive in the hearts of all good men the hope that our downward tendencies as a people may be stayed, and that we may get back upon those ancient ways wherein we walked in the better days of the republic."

Now considering that these are the words of an American, they are very remarkable, and bespeak the Chief Justice to be not only manly, independent and free from servility to popular clamour, but as having a high sense of what the bench and the bar owe to their country and themselves. But at the same time, the words show that corrupting influences have gone so far that he feels it to be not merely idle, but wrong and unpatriotic to pretend to gloss over their results.

Men, who, like Chief Justice Lawrence, would courageously dare in the face of an excitable nation, whose national self appreciation amounts to a mania, and on a public occasion to state their convictions of the corruptions, social, political and judicial, existing in their country, might well be looked upon as the saviours of their country. The words are also weighty with caution to those who blindly admire the external glitter of that state of things which is above pourtrayed.

We have seen* what such periodicals as the *American Law Review* have said of the gross corruptions in the judiciary, in some of the States. Unless there are sufficient of those who act up to the sentiments of Chief Justice Lawrence, it may well be feared that when he trusts to the judiciary to help to save the country, he leans upon a broken reed.

We are sorry to notice the death, on the 30th ultimo, of Mr. Prince, Judge of the Algoma District, better known to the public as Colonel Prince. We shall refer to the subject again.

A correspondent of the *Albany Law Journal*, writing from England, gives a flowery description of the proceedings at an assize town, before and at the opening of the court, and describes the old-fashioned ceremonies and curious attire of the judge and officials engaged, and the interest manifested by the public in the proceedings. He concludes thus: "'A fellow-traveller said, 'An American judge could not be hired to go through that exhibition.'" Possibly not. But it would appear, if American writers are to be believed, that American judges can be "hired" to do things which would make the ears of the meanest tipstaff in an English court of justice to tingle.

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* Ante Vol. IV, p. 301.

## SELECTIONS.

### THE LATE SIR FREDERICK POLLOCK.

At the bar Mr. Pollock, who died on 29th August last, rose into practice with a rapidity which finds no example in our day of keener competition and stronger personal interest. The Northern Circuit was the scene of his early success. He possessed faculties which could not fail to commend him to attorneys: an accurate and comprehensive memory, acute perception, perfect mastery of monetary accounts and the course of mercantile business, unwearied industry, and, above all, that peculiar power over the mind of his audience which never forsook him even in the final stage of his legal career. As counsel in general causes he was infinitely superior to Brougham, who, as a member of the same circuit and commanding business by his political fame, was one of his most frequent antagonists. But while the mind of Brougham was dissipating itself over a multitude of themes, social, philosophical, and parliamentary, to such an extent as to lead him to the comparative neglect of the briefs of humbler clients, Pollock never failed to bring the whole force of his gigantic intellect to bear upon the particular cause before him. Brougham won glory, but Pollock won verdicts. It is impossible at this distance of time, when all his legal contemporaries are silent in the grave, to state the exact measure of his success on the Northern Circuit, but we suppose that no counsel ever reaped a more golden harvest, or more thoroughly enjoyed the confidence of his clients and of the public on any circuit.

As a politician Mr. Pollock was a follower of Sir Robert Peel, as far as concerned the leadership of that statesman up to the year 1844. We have no means of judging how far he would have adhered to Sir Robert in the last epoch of the Peelite reign. It is enough to say that though a true Conservative he was a man of broad and liberal views, and not by any means disposed to base his policy upon mere party considerations.

As a judge he was master of his art. In the first place, his excellence was universal. He was great in banco and great at Nisi Prius. The whole page of law lay open before his eyes familiar to him as household words. His memory for precedent was not less remarkable than his grasp of the principles of jurisprudence, and he had power to express in terse and lucid language correct and just ideas. Perhaps in the public eye he was most eminent in criminal trials and at Nisi Prius No one who has heard him can forget the extraordinary influence which he was capable of exercising over the mind of a jury. After speeches from counsel of length and eloquence, the Lord Chief Baron would turn to the jury, and in a few sentences of marvellous force impress them with his view of the case, smashing to atoms the elaborate structure which the ingenuity of counsel had built up as a support to a rotten cause, and exposing the position of the unhappy suitor in all its weakness and folly. Or again, if the trial was of deep importance, involving a serious and embarrassing conflict of evidence, and loaded with an abundance of testimony of various import, the Chief Baron would with patience, skill and care sift the chaff from the wheat, balance point against point, fact against fact, and lead the jury by an easy and faithful process to a sound conclusion. If the Chief Baron had a fault on the Bench it lay in his exceeding tenderness towards the accused. At times he almost forgot in the impulse of a heart of deep benevolence the stern dictates of justice, but it is presumptuous to say that he erred substantially in this tendency, and if he did err he can hardly be denied forgiveness.

The judicial career of Sir Frederick Pollock dates from the second day of Easter Term 1844. Lord Abinger had died on April 8th in that year at Bury St. Edmund's while on the Northern Circuit, and Sir Frederick, who was at that time Attorney-General, succeeded almost as matter of course to the office of Lord Chief Baron. According to custom, he was first called to the degree of Serjeant-at-law, and gave rings with the appropriate motto, '*Audaciter et strenue.*' Sir W. W. Follett was thereupon promoted to be Attorney-General, and Sir Frederick Thesiger to be Solicitor-General. The first reported judgment delivered by Sir Frederick as Lord Chief Baron was in the case of *King* v. *Phillips*, on a point of pleading; the last reported case in which he delivered judgment was *Bickford* v. *Davy*, upon the allowance of certain interrogatories; and the last reported case in which he took part was *The Attorney-General for the Prince of Wales* v. *Crossman*, on June 26, 1866. The period of twenty years and two months intervening between the first and the last of these cases embraced two epochs in legal history, and two of the cases named constitute signs of their respective times. It is a long stride, in a metaphysical sense, from the era of special demurrer to the era of discovery at common law, and it is worthy of note that the career of Sir Frederick was spread very equally over the old and the new order of things. The reports of his judgments commence with the middle of the twelfth volume of Meeson and Welsby. The four remaining volumes of that series, the eleven volumes of 'Exchequer Reports,' the seven volumes of Hurlstone and Norman, and the volumes of Hurlstone and Coltman contain enduring records of his industry and learning. In the *Law Journal Reports* the record begins in the thirteenth volume of the new series, and continues to p. 215 of the thirty-fifth volume. What a mass of labour, what a variety of legal achievement finds witness in these ponderous pages! What uniformity of skill, of wisdom, and of zeal is therein displayed. The vast fields of technical pleading, of legal and equitable principles, of statutory construction, of commercial, civil, criminal, and fiscal law, of practice, of the rules of evidence, over which his intellect and his energy travelled as therein mapped out for the guidance of future ages journeying in the same paths of noble learning. And what a roll of names is that of his puisnes on the bench, and what a number of them he outlives! In his first year of office he was aided by Parke, Alderson, Rolfe, and Gurney. In 1864 Gurney died, and Platt succeeded. Parke rose to the peerage as Lord Wensleydale, Rolfe became Lord Justice and Lord Chancellor as Lord Cranworth. Both lived to a good old age; both were outlived by Sir Frederick. Baron Watson, elevated to the bench some few years after him, died many years before him. Barons Martin, Bramwell, Channell, and Pigott have survived him; so also has Baron Wilde, now Lord Penzance. But these are men not of his own generation. Then again, what a host of notable lawyers has pleaded before him at the bar, and how many of these have also died before him! The genius of Sir W. W. Follett has become historical. Sir T. Wilde, who became Attorney-General on the fall of Sir Robert Peel, and who afterwards was Lord Chancellor Truro, Sir J. Jervis, who served as Solicitor-General under Sir T. Wilde, and who became Lord Chief Justice, Sir W. Atherton, Attorney-General, the Right Hon. Stewart Wortley, Solicitor-General — all of these have passed away before him. Lord St. Leonards alone has outlived him, of all the great lawyers who were his equals in age.

If we attempt to regard the life of Sir Frederick Pollock as a whole, we are almost overpowered by the contemplation of its success. 'There is a skeleton in every house," was the reflection of not the least philosophic of novelists; and if we put before us any number of men who have been children of fortune, we find almost invariably some flaw in their lives, something wanting to complete happiness, something which they themselves longed for in vain. That imperfection is so constant as to bear analogy with the general system of nature. One man wins a title and wealth, but has no heir to inherit them; another has an heir to disgrace his name and tarnish his honour. One man has been stripped of the partner of his life at a period when the loss is beyond reparation; another is unfortunate in his domestic relations. One man wins wealth, but after such a life of self-denial and poverty as to find no real recompense in the reward. Another heaps up riches, but earns not the esteem of his fellows, nor even his own contentment. One man ascends to renown, but by means which his friends can only hope to forget, and which his enemies resolve to remember. Another achieves fame and money, but dwells not in the heart of a single being on earth. All these, and there is no limit to the illustrations, are tempted 'in silence and at night,' to exclaim that all is vanity. But, unless we are grossly mistaken, Sir Frederick Pollock was an exception to what we may call the rule of humanity. What is there which man can desire that he had not? What is there which man desires to be free from that was not absent from him? Does a man love length of years? He lived four score years and seven. Does a man desire health? He never knew what sickness meant. Does a man desire riches? He had more than enough to satisfy the reasonable wants of his temperate spirit, and to provide for all who had natural claims upon him. Does a man desire success in his particular calling in life? He had success, uniform and perfect. Does a man desire the good opinion of his fellow-man? Who ever bore ill will to his benevolent disposition, or ever breathed a suspicion of his integrity. Does a man long for sons and daughters to respect and love him and to perpetuate his name? Sir Frederick has been heard to say that not one of his numerous progeny ever did an act to cause him a moment's uneasiness.

Then, if these things be so, how can we mourn that at last the acute intellect and the sound body have sunk in sleep? When the first Lord Hardwicke knew that death was approaching he acknowledged readily that he could not complain of death, for in life he had been fortunate above all men; and this is precisely the feeling with which we regard the career and the death of Sir Frederick Pollock.

It is difficult, if not impossible, to draw a distinction between what he owed to the original bounty of nature and what he owed to himself. How far a man can fight against and defeat evil instincts, how far he can neglect the use and blunt the edge of the bright impulses of nature is not taught us by any philosophy. But this we may say, that Sir Frederick Pollock cherished and developed all the gifts which a bounteous Providence had bestowed upon him. If he had talent, he enlarged its limits and increased its wealth by assiduous toil. If he had physical health, he was careful by temperance and regularity of life to preserve and improve it. If he had opportunities, he grasped them quickly and retained them. If he had an honest, a truthful, and an upright nature, he never suffered even a temptation to advance against these bulwarks of integrity.

And he was happy also when he had turned his back on Westminster Hall, its fatigues and its glories. At one time amusing himself with photography, at another reverting to his old and favourite study of mathematics, at another instituting a novel research into the authorship of the letters of Junius, he preserved to the last his intellectual activity. The political controversies of the day, the Continental problems of war and peace, the Transatlantic war, all these things were studied and discussed by him with juvenile ardour. In his pleasant home at Hatton he exercised a generous and a wide hospitality, and was at all times ready to converse with old and young with equal sympathy and kindness. Anecdotes of days long gone by, his own early life, the social and political scenes in which his boyhood, youth and manhood were passed, all these were told and painted with consummate skill and with rare accuracy. That strange faculty for the recollection of dates—not in years only, but in months and in days—which was so curiously exhibited by him in the *Princess Olive's Case* in the Probate Court, frequently displayed itself in familiar talk even in the latest years of his life. But we must here stay our hand. We have said enough to show that in our judgment, if Sir Frederick Pollock was excellent as a lawyer, he was yet more excellent as a man.—*Law Journal.*

## SPECIFIC PERFORMANCE IN CASES OF HARDSHIP.

*Hilton* v. *Tipper*, V C. S., 16 W. R. 888.

The present case is noticeable as a somewhat broad assertion of the jurisdiction of courts of equity, under Lord Cairns' Act (21 & 22 Vict. c. 27), to order the payment of damages as an alternative to decreeing specific execution of contracts, in every case where justice will be satisfied by doing so. The Court, in the first instance, assumed the jurisdiction to decree specific execution of contracts, for the reason, according to Lord Redesdale, in *Harnett* v. *Yielding*, 2 Sch. & Lef. 554, that damages at law will not always put the plaintiff in as good a position as if the contract were specifically performed. Where that is so, said Lord Redesdale, the Court will interfere, and decree specific performance. It will not be decreed, however, his lordship added, in effect, against a person who is not competent to execute the contract. The Court, therefore, will not interfere where a party is called upon to do an act which he is not lawfully competent to perform, or which it is impossible for him to perform. Thus the Court will not decree specific performance of a contract to convey land, where the contracting party has a bad title, unless on terms of the party seeking performance of the contract accepting such title as the contracting party can give. These rules depend on general principles of equity and fairness, and partly, no doubt, on the rule that the Court will not make a decree which it cannot compel performance of. When a party contracts to sell, he contracts impliedly to give a good title; but, if he has not a good title to give, how can he be compelled to give that which he has not got, and cannot get? And now that the Court can decree specific performance or give damages at its option, it is probable that the Court will be loth to decree specific performances, except strictly in accordance with the rule of Lord Redesdale referred to above. For there can be no doubt that, prior to the Act, specific performance was sometimes decreed in doubtful cases, sooner than send the parties to a court of law—a difficulty which cannot arise under the present practice.

The Court will sometimes be in doubt, of the two modes of relief, which to give, particularly in cases of hardship, where the contracting party should be put to serious inconvenience or expense by the specific execution of his contract. The case to which we are about to refer arose thus. The defendant was lessee of premises under a covenant not to assign or underlet without the lessor's leave. In ignorance of the obligation he was under, he agreed to grant an underlease to the plaintiff. When the plaintiff came for his underlease, the defendant had arrived at the true meaning of his covenant, and had applied to the freeholder for leave to underlet. This the freeholder refused to give, except on terms which, though certainly not in appearance exorbitant, involved a payment, to making which the defendant preferred being defendant in a chancery suit. In the result, it appearing that the contract was not impossible to be performed, specific performance of it was decreed, with an alternative reference as to damages, in case the defendant should be unable to perform his part of it.

The meaning and object of the clause in Lord Cairns' Act, which gives the Court jurisdiction to direct the payment of damages either alternatively or in substitution for specific performance, is clearly laid down by Sir G. Turner, L.J., in *Ferguson* v. *Wilson*, 15 W. R. 80, L. R. 2 Ch. 77, to be that the Act extends only to cases where the plaintiff has or would have had before the passing of the Act an equitable right to have specific execution of his contract. It was never intended to enable parties to get damages where they have entered into a contract impossible to be performed by the other party—where there is a contract and nothing more, the parties must go to law, as heretofore. Where, as in the present case, there is a contract, and a subject of that contract which is *per se* capable of specific execution, and the Court will decree specific execution accordingly, where the subject of contract may or may not prove capable of execution, either from the incompetency of the party to perform it, or the hardship to which he would be exposed in the course of performance (provided that the extent of the hardship was not known to the contracting parties at the date of the contract), the Court will make an alternative decree for the payment of damages in the event of the defendant being unable to perform his part. But it must not be forgotten that according to *Ferguson* v. *Wilson*, where no relief by way of specific performance is possible, no claim for damages can be sustained.—*Solicitors' Journal.*

## DURATION OF A CARRIER'S RESPONSIBILITY.

*Shepherd* v. *The Bristol and Exeter Railway Company*, 16 W. R. 982.

This case involved the important question —How long does a carrier's liability *as carrier* continue? A common carrier is, as such, under a peculiar liability differing from that of any other kind of bailee. He is said to be an insurer, and is liable for all injuries to the property committed to his care, unless the injury be caused by the act of God, or by the king's enemies. A carrier may at common law exempt himself from this liability, and may enter into a special contract for the carriage of goods upon any terms that may be agreed upon. In the absence of any special contract he is liable as an insurer. In *Shepherd* v. *The Bristol, &c., Railway Company* injury was done to some cattle carried by the defendants. The cattle had been carried safely, but were injured in a pen on the defendants' premises after the actual carriage was completed. The first question was one purely of fact, viz., whether the cattle had in fact been delivered to the plaintiff? The second question was whether, if the cattle had not been delivered, the defendants were liable for the injury *as carriers?* If the defendants were responsible as carriers for the cattle during the whole time they remained in their possession, the defendants were, under the circumstances, liable to compensate the plaintiff for the damages done, as the injury had not resulted from the act of God or of the king's enemies. If the defendants were not responsible as carriers, the plaintiff could not recover without proof of negligence, of which as a fact the defendants had not been guilty. The defendants liability, therefore, assuming that the cattle had not been delivered to the plaintiff, depended solely on the question whether they were liable as carriers.

The Court were divided in opinion on the second question, which is the only one we need notice here. Bramwell and Channell, BB., held that it was not material to consider whether or not the cattle had in fact been delivered to the plaintiff, because even if they had not been delivered the defendants were not liable as carriers, as nothing remained to be done in and about the carriage of the cattle at the time the injury occurred. Martin, B., dissented from this view, and held that the liability of the defendants as carriers continued until delivery, and that there had been no delivery. The opinion, therefore, of Martin, B., differs entirely from that of the other two learned judges The question is of great importance to railway companies and to all who are in the habit of sending goods by railways. The common law liability of carriers often works very inconveniently, and it would probably be a great improvement if this liability were altogether removed, and the rights of the carrier and of the goods owner were left to be ascertained either by a special contract between them or by an application of the ordinary rules which govern all other classes of bailments. As, however, this special liability of carriers still exists, its logical consequences should be admitted, and it seems more consistent with general principle to hold with Martin, B., that a carrier is liable as carrier so long as he holds goods under the original bailment for the purposes of carriage than to decide with Bramwell and Channell, BB., that a carrier's liability is divided into two parts, although there is but one contract, and that the carrier is liable as an insurer while the goods are actually been carried, but is only liable as an ordinary bailee after the carriage is over; especially as it may be that a deposit of the goods after the transit is over is as necessary an incident of their carriage as the placing them in a truck upon the railway. As the case stands at present, however, the opinion of the majority of the learned judges constitutes an authority in favor of their view of this question.—*Solicitors' Journal.*

## A WORD ABOUT LAW LIBRARIES.

BY F. W. HACKETT.

It is said that a distinguished professor once commented as follows upon a grammar in which the author had made an ostentatious parade of learning: "I do not like to see a man put all that he knows into one book." No doubt many a man can do this, and the result would not be an inconveniently bulky volume either; still, it must be admitted that our indignant critic's position was well taken. Let us reverse the process, however, and we do not find so much to condemn. A man may acquire all his book-learning from a single work, and, if he only pursue his study with dilligence, his attainments may by no means be despised. Indeed, there is an oriental saying: "Beware of the man of one book."

Frequently one most thoroughly enjoys a book when absent from home, or at some point where reading matter is inaccessible, and where the volume that engages the attention is almost the only one at hand. It is not so much that you must read that, or nothing at all, as it is that there is nothing else to divert the attention. Every one must have felt the difficulty of confining himself to the perusal of a single volume while in the midst of a large library. The influence of the surroundings is distracting. The temptation is almost irresistible to "browse around," to take down this or that book, as fancy dictates, and glance over a few pages, till a new train of thought, or a more engaging title draws off the attention in another direction. Magazines and newspapers, when found in connection with a general library, have much to answer for in seducing readers from the enjoyment of more solid reading.

It is especially true in law studies that long continuous study, and a careful reviewing of a few books, will make a good and accurate lawyer, so far as a knowledge of the books will make a lawyer at all. Many a leader at the bar, distinguished for profound legal acquirements, has astonished the world by the scantiness of his law library. Where a man is carrying the contents of his books in his head the number of volumes need not be large. Judge Marshall studied but few text-books, but those he mastered. His opinions are remarkable for an almost entire absence of authorities.

To day, it is not considered absolutely necessary for a student to read Coke on Littleton. But, in old times, no one was thought fit to enter upon practice without a painstaking and protracted seeking of these fountains of the law. The anecdote will bear repetition of the student who had been set to work upon Coke, and had read it four times. Upon asking his preceptor, a most eminent lawyer, "What shall I take up now?" the reply was, "Read Coke again." There was a grim humor about the advice, but, if faithfully followed, we do not believe the student's time was misemployed. If law treatises were read for their freshness, our young friend had already studied Coke four times too many. But to master a tough subject, to comprehend a proposition that fairly makes your head ache, is to train the intellect and to develop the lawyer. An esteemed judge, of deservedly high reputation for his ready knowledge of common law and his acute and logical opinions, once remarked that the only books he ever studied were Blackstone, Kent, and Chitty on Pleading. "They were all that were put into my hands," said he "but I read them over and over again." * * * * *

It is by no means a misfortune to a young practitioner that he has not easy access to a large or a complete law library. Of course, if there is one in his town, he ought to avail himself of its advantages. At a certain stage, in almost every case, the more thorough the search into the authorities the better. But there is great profit in arguing out a case upon general principles, and prosecuting the line of argument as far as one can without seriously feeling the need of authority. When the point has been well thought upon, the decisions may be looked up to more advantage. Where counsel are well aware that every report and treatise is close at hand for reference the temptation is strong to do nothing in the way of original reasoning, but simply to hunt up and classify what the judges have hitherto said upon the subject. To be sure, dissecting an opinion, comparing it with the case at bar, and determining just what it is worth, as authority, requires the best talent of the lawyer. Not seldom, too, in the pressure of a large practice, a point must be set up and sustained in a hurry, and the ready lawyer knows just what books to consult, how to find the cases bearing upon the question, and how to "eviscerate" (as Choate would say) their meaning.

"A man knows a thing," observes Dr. Johnson, "when he knows it in terms, or knows just where he can find it." A knowledge of how to use a library, of course, comes only with experience.

A certain degree of familiarity with a large collection of books is, indeed, almost indispensable to a great lawyer. But before this work is to be done, it is well if the busy practitioner has acquired the habit of looking at a point in his own original way, with little or no aid from somebody's previous labors. He will have taken an important step toward the development of his reasoning powers, which, if he be master of broad elementary principles, will tend to make him something more than what is sometimes contemptuously termed "a mere case lawyer." It is interesting to note that those who have succeeded best before our Supreme Courts are, in very many instances, men whose early days were passed in the rigid school of country practice, where books were scarce and knotty law points numerous; and where, thrown upon their own resources, these lawyers framed their arguments upon their own ingenious reasoning, with but little assistance from text-books or adjudicated cases.—*Albany Law Journal.*

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Chief Justice Holt once, during the revolution, committed to jail one of the fortune-telling imposters then called French prophets; next day a disciple of this man called at the judge's house and demanded to see him, astonishing the servant by ordering to say that he "must see him, because he came from the Almighty." This extraordinary message being delivered, Holt desired the man to be shown in, and asked him his business.

"I come from the Lord, who bade me desire thee to grant a *nolle prosequi* for John Aikins, his servant, whom thou hast thrown into prison!"

"Thou art a false prophet and a lying knave!" returned the chief justice, "if the Lord had sent thee it would have been to the attorney-general, for the Lord knoweth it is not in my power to grant a *nolle prosequi.*"

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Curran once got out of a serious scrape by an execrable pun. He had incurred a rich Irish farmer's displeasure by a severe cross-examination in court; and some days afterward, being out for hunting, his horse and the chase carried him into a potato field owned by this man. Seeing him there, the man came up and said: "Oh! sure you're Counsellor Curran, the great lawyer. Now, then, Mr. Lawyer, can you tell me by what law you are trespassing upon my grounds?"

"By what law, Mr. Maloney?" replied Curran "Why, by the *lex tally-ho-nis*, to be sure."

The pun so delighted Mr. Malony that he let its author off for the trespass.

# CANADA REPORTS.

## COMMON LAW CHAMBERS.

*(Reported by* Henry O'Brien, Esq., *Barrister-at-Law.)*

### In re Elizabeth Cooper and Jane R. Cooper.

*Coroner's inquest.*

A coroner's inquest held on Sunday is invalid.

[Chambers, July 30, 1870.—Galt, J.]

Writs of *habeas corpus* and *certiorari* were granted by Morrison, J., on 23rd July, 1870, to bring up Elizabeth Cooper and Jane R. Cooper, who were committed on a warrant charging them with the murder of a child and concealment of birth.

The writs being returned, and notice having been duly given to the Attorney General of Ontario,

*John Paterson* moved for the discharge of the prisoners, on the ground that they were in custody of the gaoler on a warrant of commitment made on Sunday, the 22nd May, 1870, by John P. Kay, one of the coroners for the County of Bruce, pursuant to an inquisition indented on that day. The depositions, as appeared by the return to the *certiorari*, were also taken on that day. He cited *Dakins' Case*, 2 Saund. 291 *a*; Lewin on Coroners, p 279; Boys on Coroners, p. 167.

No one appeared for the Attorney General.

Galt, J.—The inquest and inquisition, being judicial acts done on Sunday, appear to me to be void. As, therefore, there is nothing to support the warrant, the prisoners must be discharged.

*Prisoners discharged.*

### Florey v. Royal Canadian Bank.

*Costs—Election by plaintiff to reduce verdict.*

When a plaintiff, after argument of a rule *nisi* to enter nonsuit, or for a new trial on the ground of excessive damages, elects to reduce his verdict, instead of submitting to a new trial, with costs to abide the event, he is not entitled to the costs of opposing the rule *nisi*.

[Chambers, Aug. 26, 1870—*Wilson, J.*]

A summons was obtained to review the Master's taxation of the plaintiff's bill of costs on the following facts:

There was a verdict for plaintiff for $870. The defendants obtained a rule *nisi* to enter nonsuit for new trial on the ground, amongst others, of excessive damages. Upon this rule the court gave the plaintiff leave to elect to reduce the verdict from $870 to $494, in which case rule to be discharged; otherwise there was to be a new trial with costs to abide the event. If the plaintiff should recover more than $494 then plaintiff should get his costs; if not, there were to be no costs to either party

The plaintiff consented to reduce his verdict to $494, and a rule was made that, "plaintiff consenting to reduce the verdict to $494, the rule *nisi* is discharged, and the verdict reduced accordingly," &c.

The Master held that plaintiff was entitled to no costs of opposing the rule *nisi*.

*John Paterson* showed cause, citing *McAndrew* v. *Adams*, 3 Dowl. 120.

*McMichael*, in support of summons, cited *Delisser* v. *Towne*, 1 Q. B. 338.

Wilson, J., after taking time to consider, discharged the summons, but without costs, saying the better opinion seemed to be that no costs ought to go to either party.

### Hartleb v. Phelan.

*Declaration — Irregularity.*

A declaration which omits the name of the plaintiff in its commencement is irregular.

[Chambers, Sept. 6, 1870—*Mr. Dalton.*]

*O'Brien* obtained a summons to set aside the declaration in this case for irregularity with costs, on the ground that the plaintiff's name was omitted in the commencement of the declaration, he being merely referred to as "the plaintiff." He cited *White* v. *Feltham*, 8 C. B. 658; *Monck* v. *Northwood*, 2 U. C. L J., N. S, 268; Har. C. L. P. Act (2nd ed.) p. 100, note *k*.

Mr. Falconbridge (Osler & Moss) shewed cause·

Mr. Dalton —The declaration must be set aside unless the plaintiff amend, which he may do on payment of costs.

*Order, with leave to amend.*

### Davidson et al v. Grange.

*Irregularity— Attorney—Vexatious conduct—Affidavit.*

In a writ of *fi. fa.* and the endorsements thereon, the plaintiffs were styled defendants, and *vice versa*, the words being transposed throughout.

*Held*, that the writ and endorsements were clearly irregular.

Remarks upon the vexatious and oppressive conduct of an attorney in forcing a levy for costs without any necessity, after an offer of payment in a reasonable time and manner, and upon the introduction of irrelevant and improper matter into an affidavit.

[Chambers, Sept. 1, 1870—*Morrison, J.*]

*Fenton* obtained a summons in this case calling on the defendants to shew cause why a writ of *fi. fa.* issued herein and proceedings thereon should not be set aside with costs for irregularity, and on the ground that the writ was issued with undue haste, &c.

The irregularities were: 1. The plaintiffs were described as the defendants, and 2 The defendant as John George Grange instead of George John Grange. 3. The writ purported to be issued by A. L. as plaintiffs' attorney instead of defendant's attorney, and directed the sheriff to levy of the goods and chattels of the defendant instead of the plaintiffs, such direction being signed by the said A. L. as plaintiffs' attorney, &c.

And also to shew cause why satisfaction should not be entered upon the judgment roll upon payment by the plaintiffs of the amount of such judgment irrespective of the costs of the writ and sheriff's fees, or that such other order might be made in the premises as the judge may see fit.

From the affidavit filed by the plaintiffs' attorney it appeared, that on the 20th November, 1869, a rule for a new trial in this cause was refused, which fact came to his knowledge on the evening of the 22nd: that the following day he was instructed by the plaintiffs to notify the defendant's attorney that the costs would be paid without further proceedings; and on the 24th he wrote the following letter to the defendant's attorney:

"Toronto, 24th Nov. 1869.

"Davidson et al. v. Grange.

"We are desirous to incur no further expense in this case, and will pay your costs without putting you to trouble of entering judgment Please send me by return post a copy of your bill of costs, and if we can agree on amount without taxation, we will send you a cheque therefor at once. If we cannot agree on amount, in forty-eight hours after I receive your bill, I will undertake to attend taxing office to tax costs on receiving one hours notice, and that a cheque will be given for amount on same day amount of costs is ascertained. Please let me have your bill by next post. Yours, &c. "F. F."

No reply was sent, but on the following day the plaintiffs' attorney received notice of taxation for the next morning at 10 o'clock. Mr. P., partner of defendant's attorney, attended the taxation, and admitted receiving the foregoing letter. The taxation proceeded on the Friday and part of Saturday, on which day only one item remained for consideration, viz. $25 witness fees, charged as paid to the plaintiffs attorney, which was objected to, and not then allowed by the Master.

The plaintiffs' attorney had to leave for Hamilton before the close of the taxation, intimating his intention to appeal against the allowance of the item of $25. Before leaving for Hamilton he wrote to Mr. P. the following note:—"It will be unnecessary to issue execution for the costs taxed to you in this cause, as I hereby undertake that the plaintiff will pay them on receiving notice of the amount; please send me a memorandum of the amount and I will see to it on my return from Hamilton to-night or early on Monday morning." This note Mr. P. received at 10 minutes to 12 o'clock. On the return of the plaintiffs' attorney that evening, he learned from his clients that the sheriff had made a levy.

It appeared also, that by direction of the partner of the plaintiffs' attorney, his clerk was instructed to get a cheque for the amount from the plaintiffs, which he did. This cheque he took to Mr. P., who was in the office of his Toronto agent. The cheque being payable to Mr. F.'s order he declined to take it, as it was not endorsed. He was told that Mr. F. would return that evening. It was then suggested that the cheque should be made payable to the order of his Toronto agents, which was declined, as he, Mr. P., required the money. The clerk, notwithstanding, proceeded to obtain the new cheque, but on arriving at plaintiffs' store he found the deputy sheriff there, where he had made a levy under the *fi. fa.* It appeared also that it was only a few minutes after the cheque to Mr. F.'s order was signed that the deputy sheriff made a levy, and that the deputy sheriff stated that Mr. P.'s orders to him were to put a bailiff in at once. The plaintiffs' attorney's clerk being present he told plaintiffs not to pay until Mr F.'s return, upon which the sheriff said that as he had made a levy it need not be paid for a few days The plaintiffs, who were wholesale merchants in Toronto, swore that they were worth

$30,000 over and above their debts, and generally had on hand $25,000 worth of goods.

The partner of plaintiffs' attorney stated in his affidavit, that on the Saturday he saw Mr. P. between two and thre o'clock, when he stated he would place the *fi. fa.* in the sheriff's hands. He told him that he knew nothing about the matter, it being attended to by his partner exclusively, who would return that evening from Hamilton, and suggested waiting until Monday, as the banks were then closed and the money could not be obtained before Monday. Mr. P. however declined to wait, alleging as his reason for his urgency that he had been treated sharply by Mr. F. in the case and would not wait. He was then requested to delay until he could advise the plaintiff of the amount of costs and get their cheque, which cheque his clerk got. He also stated that Mr. P. did not affect to doubt or dispute that the plaintiffs' were in good circumstances, but he told him his reason for pressing was in retaliation for something that Mr. F. had practised towards him. The plaintiffs' attorney's clerk, among other things, swore that when Mr. P. refused the cheque payable to Mr F. he (P.) suggested that the cheque should be drawn payable to the order of his Toronto agents, but on leaving to get such a cheque he called after him saying he would not accept a cheque, he wanted the money. Notwithstanding his saying so, the clerk went to the plaintiffs' for a cheque so drawn. But on getting there he found the deputy sheriff with the *fi. fa*

Mr. P. in reply filed his own affidavits, from which it appeared that he received Mr F.'s letter of the 24th instant, but on that date he had made arrangements to enter his judgment, and so he did not reply to it. He also annexed the original note of Mr. F. of the 27th instant, as shewing that he did not intend to object to the revision of the bill. The affidavit contained much matter quite immaterial and irrevelant to the merits of the application, and in some respects contradicted the affidavit filed on the part of the plaintiffs.

The plaintiffs paid to the agents of defendant's attorneys $204 72 pending this application.

*Harrison*, Q. C., shewed cause.

*Fenton*, *contra*, cited *Perkins* v. *National Assurance Association*, 2 Ex. N. S. 71; *Cruikshank* v. *Moss*, 8 L. T. N. S. 439; *Anon*, 4 Pr. Rep. 242; *Cullen* v. *Cullen*, 2 Chan. Cham. R. 94; *Reeves* v. *Slater*, 7 B. & C. 486.

Morrison, J.—After hearing the arguments an order was made that the bill of costs should be referred to the Master for a revision of the taxation as to the item of $25, charged and taxed to the defendant's attorney as witness fees, paid him for attendance at the trial of this cause. The Master has since reported his disallowance of that item

Upon inspection of the *fi. fa.* and its indorsement it is evident that it was taken out in a great hurry; on its face the plaintiffs by name are styled defendants; the true name of the defendant is George John Grange, while in the writ he is styled John George Grange; by the indorsement the writ is issued by Mr. L., styling himself plaintiffs' attorney; and the direction to the sheriff to levy is to make the amount out of "the within defendants," and signed by Mr. L. as plaintiffs' attorney. The writ and indorsement are all irregular. The main point however is in respect to the conduct of the defendant's attorney.

When the rule *nisi* for a new trial was refused the defendant was entitled to enter his judgment and to recover his costs. In the case referred to in 4 Prac. Rep. 242, I had to deal with an application somewhat analogous to the one before me, and there I felt it to be my duty to remark upon the conduct of the attorney. The successful party has a right to the entry of his judgment, but, as I said in that case, where the person against whom the execution may issue is desirous of paying the amount so as to avoid the annoyance of a visit from a sheriff's officer and a levy being made on his goods, and gives clear notice that he is willing and ready to pay the amount forthwith, and there is no reason to suspect that he is acting other than *bona fide*, and that the recovery of the amount is in no way prejudiced; in the absence of some reasonable excuse, under such circumstances the placing a *fi. fa* in the sheriff's hands is, in my judgment, *primâ facie* vexatious, and the more so in a case like this, where the amount sought to be recovered was merely costs.

I have read carefully over all the affidavits, and I cannot arrive at the conclusion that the defendant's attorney was justified in the course that he took, for immediately after the rule *nisi* for a new trial was refused, he had a clear intimation that the amount of his costs would be paid when ascertained, and again, after the taxation of costs by the note of the 27th inst. he had a better intimation, with an undertaking from the plaintiffs' attorney that costs would be paid without further delay, while the obtaining the cheque, although it required the endorsation of Mr. F., indicated the strongest intention and desire of paying the amount. On the other hand I see not the slightest pretence for the harsh proceeding of instructing the deputy sheriff instantly to make a levy, while it is also evident from the affidavit that the step was taken in retaliation for some alleged sharp practice on the part of the plaintiffs' attorney, which is no justification, but rather goes to shew that the proceedings so taken were an abuse of the process of the court I am therefore of opinion that besides the irregularities appearing on the face of the *fi. fa.*, and in the indorsement thereon, that the placing the writ under the circumstances in the sheriff's office, and instructing the sheriff at once to place a bailiff in possession, was a vexatious and oppressive act.

I think it proper to notice the way in which the affidavits filed by the defendant's attorney are drawn up. The affidavit should state only facts pertinent to the application, and upon which the party relies; it is for the court to draw the inferences and judge of their value. An attorney, who is presumed to know better, ought not to make and swear to statements such as I see in one paragraph of his first affidavit. In explaining why a change was made in the bill for attendance at the trial as the attorney and $5 a day as a witness, he says: "It was too absurd to contend that such was meant in the face of my contention, and the affidavit of disbursements made, in which the amount sworn as paid to me was as witness alone;" and again in another paragraph, "as-surely it is absurd to presume that after all the efforts I had been making to have the matter settled before I left town amicably, that I would have been so discourteous or unreasonable as not to have been quite willing to have shewn every consideration and courtesy had the clerk expressed any willingness to change the cheque or pay the amount. This I wished to do with all candour and fairness."

I see no ground for my assuming that this attorney made efforts to have the matter amicably settled. I can only see that the attorney was acting in the most rigid way to recover his bill of costs ($25 of which he was not entitled to), and without any excuse for the vexatious proceeding of placing the *fi. fa.* in the sheriff's hands, and inflicting further unnecessary costs on the plaintiffs.

On the whole the order will go to enter satisfaction on the roll; the defendant's attorney retaining out of the moneys paid in to abide the result of the application, $179.72, amount of the judgment after revision of the taxation of costs, and that the defendant refund to the plaintiff's attorney the surplus, $25 69, and that the defendant's attorney pay to the plaintiff's attorney the costs of this application, which I fix at $10.

*Order accordingly.*

## DIVISION COURT CASE.

### BEFORE HIS HONOR JUDGE JONES.

(*Reported by* B. F. Fitch, Esq., *Barrister-at-Law.*)

### Fair v. James.

### Grand Trunk Railway, *Garnishees.*

*Division Court Act, 32 Vic. ch. 23 (Ont.)—Jurisdiction of Division Court under garnishee clauses—Foreign railway—Place of business.*

Section 7, sub-sec. 1, of the Ontario Division Court Act, 32 Vic. ch. 23, provides that the garnishee summons shall issue "out of the Division Court of the division in which the garnishee lives or carries on business."

*Held*, in case of a foreign railway doing business within this Province, to mean that proceedings may be taken in the division in which the principal offices for the Province are located.

By 29 & 30 Vic. ch. 92, the Grand Trunk Railway Co., whose head office is at Montreal, leased the Buffalo and Lake Huron Railway, whose principal offices were at Brantford.

*Held*, that garnishee proceedings against the Company were properly taken at Brantford.

[Brantford, 1870—*Jones, Co. J.*]

In this case the primary creditor took garnishee proceedings under 32 Vic ch 23, against the Grand Trunk Railway Company at Brantford, it being the principal station on the Brantford line known as the Buffalo and Lake Huron Railway, and which had been leased by the former company The debt was for wages due the primary debtor for services on this branch line, and the cause of action arose at Brantford It was objected by the garnishees that the Division Court of the County of Brant has no jurisdiction over the Grand Trunk Railway Company under the garnishee clause of the above act, inasmuch as the company do not reside, live, or carry on business within the meaning of the act anywhere or in any place in the County of Brant, and that they do not so reside, live or carry on business anywhere than in the City of Montreal, in the Province of Quebec.

Jones, Co. J.—Where the garnishee proceeding are taken on a judgment already recovered against the primary debtor by the 6th section of our last Division Courts' Act, sub-section 4, the summons must issue from the court of the division in which the garnishee resides or carries on business. Although the phraseology of the two sections is slightly different, the provisions are, I think, substantially the same.

The debt owing by the garnishees in this case to the primary debtor was for wages earned and payable at the Brantford station, within this division. Had the primary debtor sued the garnishees for these wages the suit could have been entered and tried in this court, as the whole cause of action arose in this division. I mention this, as in the argument before me a good deal of stress was laid by the counsel for the garnishees, upon the hardship they would be subjected to could they be called upon to answer such suits as these at every Division Court along the line. I think there is nothing in this argument, for these garnishees may now be sued as defendants in any such court, provided the cause of action arose there; and, as a rule, it is more convenient to both parties that a case should be tried in the division where the cause of action arose, and where the witnesses, if any, would probably reside, than it would be to try it at Montreal or any other place where the garnishees might carry on business.

In the English authorities cited by the garnishees the same argument of inconvenience was raised, and it had a considerable weight with the court, but there a defendant can only be sued in the district where he resides or carries on business, except the special leave of the judge is obtained to sue him where the cause of action arose; but by our Division Courts Act, as already remarked, it is optional with the plaintiff to bring his action either in the division where the defendant resides or where the cause of action arose

The main question, however, is whether the garnishees carry on business within the meaning of the Act, at Brantford The evidence shewed that the debt owing by the garnishees to the primary debtor was for wages due the primary debtor for services on the branch line of the railway from Buffalo to Goderich, and that the cause of action arose at Brantford, which is the principal station on that line. This branch line was originally built and owned by the Buffalo, Brantford and Goderich Railway Company as an independent line. Brantford was the principal station, and the head offices of the company were situate at that place. The manufacturing and repairing shops for the whole road were also located there. That company becoming involved sold their road to the Buffalo and Lake Huron Railway Company, who continued and extended the same business that the old company had carried on at Brantford, at which place the head offices of the company, and the machine works and manufacturing and repairing shops for the road were still continued.

The Buffalo and Lake Huron Railway Company leased their road to the garnishees. See 29 & 30 Vic. ch. 92.

The garnishees have still continued the workshops at Brantford, where they have a superintendent of those works, Mr. Jones, who employed the primary debtor. They have also there a local superintendent of the line, Mr. Larmour, who acts under instructions received by him from Montreal, at which latter place the chief offices of the company in Canada are situate. The general manager again receives his instructions from the Board of Directors in London, England, where the head office of the company is situate.

I think from the above consideration that Brantford stands in a different position from that of a principal station. It appears to be the place where the business of the line is centred and carried on.

The case of *In re Brown & The London and North Western Railway Co.*, 4 B. & S. 326, is cited by the garnishees to shew that a railway corporation only carries on business within the meaning of the English County Court Act, at the place where their head office is situate and the general business of the company is transacted. But in the above case the defendants had their head office and general place of business in England, where they might be sued. Suppose their head office was in France and the business in England was carried on through instruction from such head office, would it be held that the company did not carry on business in England, and therefore that they could not be sued there?

The case I have supposed is very much like the position of the Grand Trunk Railway Co. as respects this Province. The City of Montreal, where the garnishees have their chief offices in Canada, is not in this Province, and our courts have no jurisdiction there. It is unto us a foreign country. To compel the plaintiff to go there to prosecute this matter would be to deny him any relief, for the Act under which these proceedings are taken does not apply to that Province.

When therefore the Legislature enacts that these proceedings may be taken against a garnishee at the place where he carries on his business, it must mean, I think, where the business is carried on in this Province. To put any other construction on the act would be to render its provisions nugatory.

Now the Buffalo and Goderich line of railway is a distinct branch not owned by the garnishees, like their main line, but leased by them and worked under a special arrangement with the Buffalo and Lake Huron Railway Company * If the question is as to what place in this Province the garnishees carry on their business as regards this line, I think the answer would be Brantford, for the reasons I have already stated, and as I think it my duty to put such a construction on the act as will give effect to its provisions, I hold that the proceedings have in this case been properly instituted in this court, and that I have jurisdiction in the matter.

If it should be held that the garnishees could not be proceeded against at Brantford on the ground, that although their principal business as regards this line is carried on here, yet that it is so carried on under instructions from Montreal, would it not in effect be saying that neither could they be proceeded against at Montreal, because the business there is carried on under instructions from the head office in England.

## QUEBEC REPORTS.

### SUPERIOR COURT—In Review.

### Rooney v. Lewis, ès *qual.*

*Held*, that under Con. Stat. Can. cap. 17, sec. 33, the only recourse against the first appraisement of the collector was an appraisement by two merchants as therein prescribed. An importer who preferred to pay the duties exacted by the collector had no action to recover them back.

[14 L. C. J. 155.—February 28, 1870.]

**Mondelet**, J.—The plaintiff, a merchant and importer of this city, brought an action, in 1866, in the Circuit Court for the District of Montreal, against defendant, the then acting collector, to recover $186 40, which he alleged was illegally exacted from him by the defendant, being an excess on the valuation of goods imported by plaintiff from Scotland. It is pretended that the fair value of these goods was $560 20, and not $746 40, and moreover, that the duty at the Custom House here should have been measured on the fair market price in the principal markets in Scotland at the time of the purchase. The defendant, on the contrary, maintains that it is to be determined by the fair value of the principal markets at the time of the exportation. It was, of course, necessary for the plaintiff to prove, first, the time of purchase; second, the time of exportation; third, the fair value of the principal markets of Scotland. Strange to say, none of these indispensable proofs are to be found in the answers of the witnesses, who, on a *commission rogatoire*, were examined in Scotland on behalf of plaintiff. It appears by the evidence that Rooney had made an advance of £500, for the purpose of getting the goods, but at what time we do not know, nor is it shown when the goods were manufactured, delivered and exported. The invoice has not been substantiated by proper evidence. The groundwork, or rather what should have been the groundwork of his claim, is therefore altogether wanting I need not dilate upon the question as to whether the appraisement is to be made on the fair value of the goods at the time of the exportation or at that of the purchase. The law is clear; there can be no two opinions on that point. It is at the time of the exportation, and not at the time of the purchase. A difficulty was started at the hearing of the case with respect to the plaintiff, subsequent to the notice he gave of his intention of paying under protest, paying, instead of having the appraisement revised by two merchants, as he was invited by the acting collector to do. Is this a renunciation? Is the plaintiff deprived of his recourse? We find in our statute a word, upon the interpretation of which turns the solution of the question as to whether Rooney, not having resorted to the mode of submitting his claim to appraisers, and choosing to pay rather than do it, has or has not waived his right of any recourse. A case which was decided by the Supreme Court of the United States (*Rankin et al v. Hoyt*), in 1846, is cited against the pretensions of the plaintiff in the present case. By this decision it appears that "the importer had a right to appeal to another board of appraisers, differently constituted; and if he did not choose to resort to them, he cannot with much grace afterwards complain that an over-estimate existed." It has been argued that the word "may," to be found in our statute, confers no obligation upon the importer to refer the difficulty to appraisers, and that no other expression but "shall" could have such binding effect. The answer to this objection is, that if the word "shall" had been used in the statute nothing could have been done, no payment could legally have been received by the collector, as long as such reference to appraisers had not taken place, even when all parties were agreed, which would be absurd. The interpretation, and the only rational one, is that it is optional for the importer either to refer his case to appraisers, in order to save his recourse, or to pay the dues, and there the matter ends. For the above reasons, I am in favor of reversing the judgment appealed from (Berthelot, J., Circuit Court, Montreal). Both on the want of evidence and on law, the plaintiff's action should be dismissed.

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* Since giving this judgment the Grand Trunk Railway have purchased the Buffalo and Lake Huron line, and the purchase was ratified by an Act of last Session, 83 Vic. cap. 9 (Can.).—Eds. L. J.

Mackay, J.—The appraisement in 1866 gave an advance of 33⅓ per cent. beyond invoice value. Rooney paid, although notified by defendant, that if dissatisfied he could get a second appraisal by two merchants. McLellan, one of the witnesses examined, proves clearly that the $186 40 in dispute was paid only after such offer to Rooney. He preferred to pay rather than have recourse to the arbitration of merchants. The law referring to this case is found in Con. Stat. Ca. cap. 17. It enacts that the collector, if doubting the truth of invoice valuations, may order a custom-house appraiser to value the goods, and upon his appraisal the collector may insist on further duty, but the importer need not pay this unless he please. He may insist, before making any payment, upon a further appraisal by two merchants, upon whose report the duties are to be *finally settled*. Before this statute, the 10 & 11 Vic. (1847) cap. 31, ordered the duties to be finally determined upon merely one appraisement, by two appraisers appointed by the Government. So, the later law afterwards put into the Consolidated Statutes was an extra liberty to importers. This law (by which this case and *Joseph* v. *Lewis* are to be disposed of) is ordered by itself to be interpreted in favor of an efficient collection of the revenue. Section 33 says that if the importer is dissatisfied with the appraisement made as aforesaid, he *may* forthwith give notice in writing to the collector, who *shall* select two discreet merchants, &c. "But," plaintiff says, "the act does not provide that it shall be final, if the importer fails to call for a second appraisement by merchants chosen by the inspector. The effect of the act is to give the importer the right to apply to a tribunal of summary jurisdiction if he chooses. He 'may forthwith,' &c., but neither directly nor by implication is he *compelled* to do so. For his right to apply to the ordinary tribunals for redress from illegal exactions is nowhere taken from him. The distinction observable in the use of the two words, 'may' and 'shall,' in section 33 of our act, as applicable to the individual and the public officer respectively, is quite remarkable," says the plaintiff, and he adds, "there are nearly analogous cases in 9 Price, p. 310, and in 10 Price, p. 138. In one a landlord was authorized to lay a complaint before two justices on a certain subject, who were empowered to adjudge upon it. But it was held that he was not thereby prevented from applying to the court if he chose."

As to the two words, "may" and "shall," referred to, they are proper words in their places. Had "shall" been used where "may" is, the importer would have had one right less; and look at the absurdity it would have led to. The second appraisal, in all cases, would be necessitated, though the importer might be willing to submit to the first, though dissatisfied. The two words, "may" and "shall" have occurred in like places in other Customs Acts in all countries. Though the act may not expressly make the first appraisal final, that first appraisement may be rendered a finality, that is, if the importer pay; preferring to do so rather than go into further appraisement. Standing as at the date of plaintiff's payment to defendant after the first appraisal, what right had plaintiff? Had he the right to elect to come here, *or* to go before the tribunal of the merchants? He might elect to come here, he says; but the court holds the contrary. If the plaintiff prevailed, the Dominion would not get the duties of the statute, but duties after the mode of the plaintiff resorting to this court. The plaintiff's case is very different from that of the landlord in the case in Price; and very different from *Sharp* v. *Warren* cited, where a summary remedy was given by statute, and it was insisted that the parties could not have recourse to their previous right to sue by action at law. But the court held the contrary, and that the objection could only have weight if the statute had been imperative. Looking at the Customs Act of the Consolidated Statutes, at its object, and the tribunal of merchants it erects, we cannot doubt that the plaintiff had to resort to that tribunal if dissatisfied, and could resort to no other. That was and is a tribunal well fitted to dispose of such cases. The work to be done in such cases requires inspection of all manner of goods. How could this court perform such work? Then the duties are to be *finally* those of that tribunal (sec 33), and very properly. It concerns the public that the revenue be promptly gotten in. But under plaintiff's system enormous sums of customs duties money might be put into the *limbo* of the ordinary law courts, and enormous amounts of customs duties money might have to be held by the treasurer as in suspense.

The plaintiff says that his views are correct, and that this may be established by a reference to the recent act consolidating and amending the customs laws, 31 Vic cap 6, sec. 45. This statute adds a new provision to the former one, namely, that the decision of the proper officers shall be held to be final, unless the importer give notice of his dissatisfaction and appeal to the minister of customs, whose decision shall thereupon be final, *unless suit be brought for the recovery back of the duties illegally exacted*, within sixty days after such decision; and it expressly enacts, "that no suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until such decision shall first be had on such appeal." But the recent act is new, positive law, and more favorable to importers than the earlier acts. The 10 & 11 Vic. was very unfavorable to the importer; under it there was only one appraisement, and it was decisive and final, settling the true and real value of goods at what was so appraised. Then came the 12th Vic., the act that these cases turn on; it allowed an appraisal beyond the first one, and such appraisement was evidently meant to be final. It does not read that the appraisement shall be final and conclusive, "unless," &c. Then comes the new law, 31 Vic., referred to by the plaintiff; it is still more favorable to the importer; but it is not to control this case. [His Honor cited Aylwin, J., in *Moffatt* v. *Bouthillier*, 5 L. C. Rep. p. 311, and a case in 4 Howard's R., to support the position that the plaintiff had no right to sue in this court, having refused to avail himself of the tribunal of merchants ] The reading of these cases with our statute law leads the court to hold that plaintiff has no right of action against defendant But plaintiff is doubly estopped; for, from the evidence, he paid what he did under such circumstances, and with such knowledge as prevents him getting back what he paid His goods had not been seized The plaintiff was not in defendant's power. He had other rights and other remedy to use, if he did not choose to pay defendant. But this other remedy was waived. Look at the case as at the time immediately before plaintiff paid Could Rooney, for instance, after notice of the first appraisement, refusing to pay the duties asked of him, have sued defendant? Could he have revendicated these goods, and dispossessed the customs without paying? No; he could only have moved for the reference to the merchants. If, however, he preferred to make a finality of the first appraisement, he could, on paying (as in this case he did), obtain his goods, and, if they were then refused, revendicate them. As to the value of the goods, the court is with the plaintiff.

**Torrance**, J., observed that his opinion was based mainly on the authority of the case cited from 4 Howard's Rep. 327–335, *Rankin et al* v. *Hoyt*.

The judgment is *motivé* as follows:

The court here sitting as a Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Circuit Court for the District of Montreal, the 30th of June. 1869, having examined the record and proceedings had in this cause and maturely deliberated;

Considering that there is error in the said judgment of the 30th of June, 1869, revising said judgment doth reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises;

Considering that the duties upon such importations as the plaintiff referred to in his declaration were, at the time referred to, appointed to be ascertained, finally adjusted and determined, and levied in and by the mode prescribed by chap. 17 of the Consolidated Statutes of Canada;

Considering that the plaintiff, though at first dissatisfied with the appraisement that the defendant had caused to be made of the woollen goods of the plaintiff, paid deliberately in April, 1866, the amount of duty that the defendant asked and took from him, he, the plaintiff, declining to have or move towards the other or further appraisement, to wit, by two discreet and experienced merchants, according to section 33 of said chapter 17, C S. C., and preferring to pay what he did to the defendant;

Considering that the plaintiff has not proved that the defendant wrongfully collected or took from him the money amount sought to be recovered by the present action;

Considering that, under the circumstances of this case, the defendant was justified in taking from the plaintiff the full amount for duty that the plaintiff paid him in April, 1866;

Considering the plaintiff's action in the Circuit Court unfounded for the reasons aforesaid, and under the law, the court doth dismiss the same with costs to the defendant against the plaintiff in the Circuit Court, and with costs of this Court of Revision to said plaintiff in revision, &c.

Mr. Justice **Mondelet** concurs in the judgment, but is of opinion that the judgment should go further and decide that there is in this cause no evidence of the time at which the goods were exported from the place where they were bought, nor of the fair market value of such goods at the place whence they were exported.

*Judgment reversed.*

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## Davidson, *Petitioner*, and Baker, *Respondent*.

*Held*, 1. That when the certificate of election, granted to a lay delegate to "The Synod of the Diocese of Montreal" by the chairman of the Vestry meeting held for the election of lay delegates, is in form and found to be satisfactory by the committee appointed to examine the certificates of such lay delegates, it is not competent to the Synod to enquire into the validity of the proceedings at the Vestry meeting, or in any way to try the validity of the election certified to in the certificate.

2. That the second clause of the constitution of said Synod was and is legal.

[14 L. C. J., 165.—April 5, 1870.]

This was a writ of *quo warranto* for the purpose of ousting the defendant from exercising the office of lay delegate to "the Synod of the Diocese of Montreal."

The facts and questions raised are sufficiently shown in the following remarks of the Honorable Judge:

**Per Curiam.**—The *requête* of petitioner in this matter asks that Baker, the defendant, be held to have illegally usurped the office of lay delegate for Christ Church, Sweetsburg, in the Synod of the Diocese of Montreal, and to be guilty of unlawfully holding and exercising said office; that he be ousted from it; that the decision of the majority of the Synod against petitioner, Davidson, be declared illegal; that the petitioner be declared to have been duly elected as lay delegate to said Synod from said Church, and that the Synod be ordered to reinstate him as such lay delegate. The petition sets out with stating the Synod incorporation; it then proceeds to state an election in March, 1869, at the Easter meeting at Christ Church, Sweetsburg, at which election petitioner was duly elected a lay delegate to the Synod; that he received from the incumbent chairman at the meeting a certificate of his election; that he presented it at the Synod, in May, 1869, and claimed to take his seat; that the committee to report on certificates passed upon his and approved it, and put his name upon the roll of delegates; that thereafter a motion, supported by affidavits, was made by a lay delegate, that the name of petitioner should be struck off the roll, and the name of Baker substituted for it; that the chairman ruled this to be out of order; but, upon an appeal from the chair, the majority of the Synod maintained the motion, and Baker then and there was admitted and the petitioner excluded from the Synod, &c. The defendant, Baker, by his answer, defends the action of the Synod, and claims that at the vestry meeting at Sweetsburg, he (Baker) was elected; that he had the majority of votes, and the chairman so declared at the time, but afterwards acted to the contrary, and gave petitioner, his son, the certificate; that at the Synod the chairman could not prevent the Synod disposing of the question as to whether Davidson or Baker had the right to sit; that clause number two, of the Synod constitution, relating to qualification of electors, was illegal and void, &c

The 19 & 20 Vic. cap. 121, and 22 Vic. cap. 189, enable the members of the Church of England and Ireland to meet in Synod. The meeting of Synod, and the adoption by it of a constitution, &c., followed this 22 Vic.; and the second clause of such constitution states who may be lay representatives, and how elected.

2. The lay representatives shall be male communicants of at least one year's standing, of the full age of twenty-one years, and shall be elected annually at the Easter meetings, or at any vestry meeting (specially called for such purpose by incumbents, after due notice on two Sundays), held by each minister having a separate cure of souls, and all laymen within the cure, of twenty-one years or upwards, entitled within such cure to vote at vestry meetings, or who hold pews or sittings in the church, though not entitled so to vote, who shall have declared themselves in writing to be "members of the United Church of England and Ireland, and to belong to no other religious denomination," *shall* have the right of voting at the election.

And in clause 5 the certificate of election is given as follows:

"This is to certify that at a meeting held this day for the purpose of electing delegates to represent this congregation or parish in Synod, being the parish or mission of ———, ———, a communicant of one year's standing, and of the full age of twenty-one years, was elected by the laymen of this congregation, who have a right to vote at such election, by virtue of their having, in accordance with the second clause of the constitution of the Synod of this Diocese, declared themselves in writing, in a book kept for that purpose, to be members of the United Church of England and Ireland, and to belong to no other denomination, and being qualified otherwise under the provisions of said clause.

"And such certificate of election shall be considered and taken as sufficient proof of the election; and such lay delegate shall continue in office till his successor is appointed."

And article 8 of the rules and order of proceedings reads as follows:

8. After this prayer the clerical secretary shall call over the roll of the clergy, to be furnished by the Bishop, and mark the names of those in attendance; and the secretary shall call over the names of the several parishes, missions or cures, when the certificates of the representatives having been presented, shall be examined by the secretary and a committee of two, to be named by the chairman for that purpose; and where found satisfactory, the names shall be recorded and read by the secretary.

The petitioner received the formal certificate of election from the incumbent of Sweetsburg. Much should be presumed in favour of such certificate, and the Returning Officer's Act ought to be presumed true and honest. That certificate was such presumptive evidence of Davidson's right to the office of lay delegate, that upon it, approved 11th of May, 1869, by the committee, and his name being recorded by the secretary, he ought to have been admitted to the Synod. The certificate, so approved, ought to have been held by the Synod then and there sufficient proof of Davidson's election. The decision of the chairman of the Synod was right; the overruling of it was wrong, and so was the erasing petitioner's name from the roll of delegates, and the inserting of Baker's instead of it.

The case has been presented not only on what was done in the Synod, but petitioner and defendant have also gone upon the merits of the election at Sweetsburg, and petitioner has to succeed upon this We see exactly all that passed there 29th March, 1869. The meeting was a curious one, and the incumbent presiding at it became perplexed by what took place, and was unsettled a little as to what to judge and do. Six at the meeting voted for Baker (if we include himself); three voted for Davidson. Baker was qualified to vote or to be elected; so were the three who voted for Davidson. The other five were not holders of pews or sittings, and had no title to pews or sittings, and had no vote. The church is a proprietary one, and has a title. Shufeldt explains it in his evidence in rebuttal. How different it is with Abraham Pickle and the others! As to these, could any of them maintain action against anybody as for disturbance to their possession thereof — *i e*, of any pew or sitting (under the Temporalities Act)? I think not.

The chairman at the election registered Thomas Cotton as a delegate to the Synod, and Baker as "elected by those who had no right to vote," and Davidson elected by those entitled to vote. (Two delegates were to be elected ) No proclamation or declaration of the result was made at the meeting, and none was necessary.

The certificate granted to Davidson by the chairman was so granted upon what he believed to be required by the constitution, article 2, above quoted. This article is said by defendant to be contrary to 22 Vic. cap. 189, and therefore illegal. But this must not control absolutely; it is to be taken with the 19 & 20 Vic. cap. 121. Following the 22 Vic. is the constitution of the Synod, and these three taken together control. The Temporalities Act 14 & 15 Vic cap 176, has also to be considered to a certain extent, and it makes against defendant and his voters in a way, *e. g.*, as settling what is meant by holding a pew or sitting. The second section of this act enacts as follows: "That all pew-holders in such churches or chapels whatever, holding the same by purchase or lease, and all persons holding sittings therein by the same being let to them, * * * after the passing of this act, by the corporation of such church or chapel, *and* holding a certificate from such corporation of such sitting, shall form a Vestry," &c. It is said, too, with some force, that the 31 Vic. has acknowledged the validity of the constitution of the Synod of Montreal, and so it has in enacting as follows: "Sec. 2. The said incorporated Synod shall have power from time to time to amend, repeal or alter the present constitution, canons, rules and regulations of the aforesaid Synod, &c., * * * but until so amended, repealed or altered, the constitution, canons, rules and regulations of the said Synod *presently* subsisting and in force, shall be and continue to be the constitution, canons, rules and regulations of the corporation aforesaid, created by this act." I think the constitution valid and binding.

The act of the public officer, with his testimony and the other evidence of record—that is, in favour of petitioner—is stronger than the evidence for defendant, and makes a good case for petitioner, whose petition is, therefore, maintained. The defendant is declared guilty of the usurpation charged against him by Davidson, and must be ousted. The petitioner, Davidson, is declared to have been duly elected, and entitled to his seat as delegate for Christ Church aforesaid. The Synod proceedings against Davidson, complained of, were unreasonable at the time they took place, and were and are illegal, and are overruled; and order must go to the Synod to admit the petitioner, Davidson, as a lay delegate from Christ Church, Sweetsburg, and reinsert his name as such in place of the defendant Baker's, in the roll of delegates; the whole with costs against defendant.

*Judgment for petitioner.*

## ENGLISH REPORTS.

### COMMON PLEAS.

### Jackson v. Spittall.

*Practice—Cause of action—British subject out of jurisdiction—Common Law Procedure Act, 1852, ss. 18 & 19.*

The plaintiff sued a British subject living in the Isle of Man on a contract made there, the breach taking place within the jurisdiction of the Court. The plaintiff, under the Common Law Procedure Act, 1852, served the writ in the Isle of Man. The defendant, without waiting for the plaintiff to obtain an order to proceed, obtained an order to stay proceedings, on the ground that the whole cause of action did not arise within the jurisdiction.

*Held*, that the defendant was not bound to wait for the plaintiff to make an application to proceed before obtaining such an order.

*Held* also, that the phrase "cause of action" in the Common Law Procedure Act, 1852, s. 18, means the act on the part of the defendant, which gives the plaintiff his cause of complaint.

*Held* also, that section 19 is to be construed in the same way.

[18 W. R. 1162, C. P.]

The defendant in his affidavit stated that he had been served with a writ of summons for service out of the jurisdiction of the Court, and that the alleged cause of action, if any, wholly arose at Douglas, in the Isle of Man, out of the jurisdiction of that Court, and that no part thereof arose within it.

The plaintiff's attorney, in his affidavit stated that the action was brought to recover damages against the defendant, who is a resident in the Isle of Man, for a breach of an undertaking entered into by him with the plaintiff, in consideration of the plaintiff endorsing to him, at the request of Drinkwater, who was then indebted to the defendant, and to be held by the defendant merely as a collateral security, a bill of exchange or acceptance drawn by a company for £1,000, which the plaintiff held as trustee for Drinkwater, by which the defendant undertook that he would not part with the bill out of his possession, but would always hold the same without recourse to the plaintiff; and further the defendant, in violation of his promise, did part with the possession of the bill, and endorsed and negotiated the same to Drinkwater in Manchester, where Drinkwater resided and still carries on business. Drinkwater endorsed the bill to Buckley, Drinkwater having had full notice of all matters relating to the same, and after acceptance became due, the bill was dishonoured, the acceptors being a company in liquidation at the time of endorsement by Drinkwater to Buckley. The plaintiff was then sued upon his endorsement by Buckley in the Court of Exchequer: the action was defended by the plaintiff at the request of the defendant, and was tried at Manchester, when a verdict was found for the then plaintiff, and the plaintiff paid the amount of the verdict and the costs for defending the action. That the defendant was a witness in *Buckley* v. *Jackson*, and after the trial, the defendant, whilst at Manchester, requested the plaintiff to discharge the verdict and costs, and he undertook to refund the plaintiff. That this action was also brought to recover the amount paid by the plaintiff at Manchester on behalf of the defendant there, on his promise as above stated, and calculations were made between the plaintiff and defendant, as to the amount required to discharge the defendant's obligation to the plaintiff, and the defendant said he would proceed against Drinkwater for the wrongful endorsement.

The defendant in his affidavit of March 18th, 1870, states that he resides at the Isle of Man, and denies that he entered into an undertaking not to part with the acceptance, &c.; that the acceptance was not held by him as trustee, but as security for the payment of an acceptance of Drinkwater to him for £910; that the arrangement for giving up the bill to Drinkwater was made in the Isle of Man; that the plaintiff did not defend *Buckley* v. *Jackson* at his request, and that he was informed that the plaintiff was sued as the drawer of the bill.

There were other allegations in the affidavits filed by both sides immaterial to the present case.

On the 9th of April an order was made by Master Bennett on these affidavits — that the plaintiff do undertake to prove a cause of action which has arisen within the jurisdiction of the court against the defendant, and that the defendant be at liberty to appear within twenty-four hours after such undertaking being given; and in default of such undertaking, the suit and all subsequent proceedings be set aside, plaintiff to pay the defendant the costs of the former action.

On the 2nd of April, upon plaintiff's application to rescind the above order, Baron Bramwell made the following order:—"That the order made herein by Master Bennett, directing payment by plaintiff to defendant of £5 10s., be rescinded. And as to the residue of the application to rescind the said order, I make no order."

*Hughes* having obtained a rule *nisi*, calling upon the defendant to show cause why so much of the order made by Master Bennett as was not rescinded by Baron Bramwell should not be rescinded,

*Bridge* showed cause on behalf of the defendant.

*Hughes* supported the rule.

The arguments and cases are set out in the judgment.

*Cur. adv. vult.*

The judgment of the Court (Bovill, C.J., and Keating, Montague Smith, and Brett, JJ.), was delivered by

Brett, J.—In this case the plaintiff sued the defendant, a British subject, living in the Isle of Man, upon an alleged breach of contract not to endorse a bill of exchange delivered to him as a security. The contract, it was said, was made in the Isle of Man; the breach by endorsing over took place in Manchester. The plaintiff, under the provisions of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), had served the writ of summons on the defendant in the Isle of Man. The defendant, without waiting for the plaintiff to take the next step of obtaining an order to proceed, took out a summons before the Master, and obtained an order to stay proceedings in this suit, on the ground that the whole cause of action did not arise within the jurisdiction of the Court. Upon this the plaintiff took out a summons before Bramwell, B., to set aside such order, and Bramwell, B., referred the matter to the Court. On the part of the plaintiff it was contended that the summons taken out by the defendant before the Master was premature, and therefore unauthorised; that the objection if otherwise valid, should only be taken when the plaintiff should apply for leave to proceed; and further, that the defendant's objection, if taken at the right time, was invalid, because in order to entitle the plaintiff to proceed, it was not necessary that he should satisfy the Court that the whole course of action, in the sense of every fact necessary to be proved in order to support the plaintiff's case, had arisen or taken place within the jurisdiction. On the part of the defendant it was contended that the summons before the Master was not premature: *Binet* v. *Picot*, 4 H. & N. 365, and *Diamond* v. *Sutton*, 14 W. R 874; and that it was a fatal objection to any further proceedings in the suit by the plaintiff, that the whole cause of action, in the sense above-mentioned, did not arise within the jurisdiction. As to the first point we see no objection to the Master's order made with regard to the process of the Court, on the ground that it is made upon a summons taken out by the defendant instead of upon a summons taken out by the plaintiff. We agree with the decisions cited during the argument by the Court of Exchequer (viz., the cases hereinafter considered). The second point is one of great importance. Besides, its application to shipping contracts made in all parts of the world, the daily increasing trade with the more adjacent countries of the Continent, in the course of which numerous orders are given abroad, either to firms wholly foreign, or to British subjects resident and carrying on business abroad, but which orders are to be fulfilled in England, makes the question now before the Court, one of the greatest importance for mercantile interests. During the argument several decisions of the Court were cited. If in this case and those cited there had been an appeal to a court of error, we might have felt bound to decide in accordance with the latest decisions of the court of co-ordinate jurisdiction and have left the parties to appeal. But there is no such appeal; and, moreover, we find that the decisions are far from uniform. The cases relied on by the defendant are *Sichel* v. *Borch*, 12 W R. 846; 2 H. & C, 954, which was an action by the plaintiff, as indorsee, against the defendant, as indorser of a bill of exchange. The defendant, who was a native of Norway, and carried on business in Norway, drew the bill there, and endorsed it and sent it by post to London, to H. Dresser and Co., who endorsed it to the plaintiff. The defendant was served in Norway with notice that the action had been commenced against him. The Court made absolute a rule to set aside the service, on the ground that the case was not within section 19 of the statute 15 & 16 Vict. c 76. Pollock, C.B, and Martin. B, stated that the whole cause of the action must arise within the jurisdiction; that where the contract was made abroad, and the breach took place in England, the case was not within the statute. Pollock, C. B., referring evidently to the cases upon the construction of the County Courts Acts stated that it had been laid down in an analogous matter, that the term "cause of action," means "the whole cause of action." Pigot, B., expressed considerable doubt, but acquiesced in the decision No previous case was cited. The former decision of the Court of Exchequer in *Fife* v. *Round*, 6 W. R. 282, was not cited, and the attention of the Court was not called to the difference of the rule applicable to the construction of statutes in questions of jurisdiction affecting superior and inferior courts The next case relied on was *Allheusen* v *Melgarejo*, 16 W. R. 854, in which the defendant, a foreigner residing abroad, entered into a contract abroad with the plaintiffs to sell them a quantity of manganese, to be delivered at Newcastle-upon-Tyne. The Court, consisting of Blackburn, Mellor, and Lush, JJ., held that the whole cause of action did not arise within the jurisdiction, and therefore the case was not within the statute. They decided on the authority of *Sichel* v. *Borch*, and and they seem to have doubted the authenticity of the reports of the cases of *Slade* v. *Noel*, 4 F. & F. 424, and *Nettleford* v. *Funcke*, before Willes, J., at chambers (not reported). In the former decision of the Court of Exchequer, viz., *Fife* v. *Round*, a promissory note, by which the defendant promised four months after date to pay the plaintiff £150, was made in France, and delivered to the plaintiff there. The note was in the margin made payable at a London bank.

On being presented it was dishonoured. Bramwell, B., had made an order under section 18 of the Common Law Procedure Act, 1852, empowering the plaintiff to proceed. Upon a motion to set aside such order, it was argued that the cause of action did not arise in England, and the county court cases were cited. The Court, consisting of Pollock, C.B., Martin, Watson, and Channell, B.B., upheld the order; Pollock, C.B., and Martin, B., both stating that the cases upon the construction of the County Courts Act did not apply. In *Slade* v. *Noel* a cargo had been loaded abroad under a charter party made abroad, and the ship-owner claimed demurrage for delay at the port of discharge in England. Williams, J., at chambers, after, as it is stated, a careful consideration, held that the case was within section 18, and made an order empowering the plaintiff to proceed. In the case of *Nettleford* v. *Funcke*, Willes, J., in March, 1866, at chambers, held that on delivery of goods in England under a contract made abroad, an action brought for the price was within section 18, and made an order empowering the plaintiff to proceed. The same learned judge, in the case of *Allhausen* v. *Melgarejo*, which had been discontinued in the Court of Queen's Bench, and brought up on a new writ of summons in the Court of Common Pleas, after the decision above cited of the Court of Queen's Bench, made an order under section 18 giving leave to the plaintiff to proceed, and the plaintiff recovered large damages. This decision is reported in the *Weekly Reporter* of June 13, 1868 (16 W. R. 855), and the learned judge said, "I make this order according to the practice followed since the Act passed, and according to the construction of the Act which I have reason to believe was intended. The cases affecting the jurisdiction of the inferior courts are, I think, quite inapplicable. The superior courts had jurisdiction in such a case before the Act by proceedings in outlawry. They have such jurisdiction now on the subject-matter confessedly. If the defendant chooses to raise the question he can do so by motion, or perhaps by plea in abatement. I do not feel myself at liberty to depart from the usual practice without a decision of the Court in which the process is—viz., Common Pleas." Upon this state of the authorities, and in the absence of any appeal to a superior tribunal, we feel bound to enquire closely and anxiously for ourselves what is the true construction of sections 18 and 19 of the statute 15 & 16 Vic. c. 76. According to a familiar canon of construction, it is first desirable to consider what was the law at the time the statute passed. So far as relates to the question of jurisdiction, we apprehend that the superior courts of England did not decline jurisdiction in the case of any transitory cause of action, whether between British subjects and foreigners resident at home and abroad, or whether any or every fact necessary to be proved, in order to establish either the plaintiff's or the defendant's case, arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him when present in England. In *Ilderton* v. *Ilderton*, 2 H. Black. 145, Chief Justice Eyre, in discussing the question of the jurisdiction of the English courts to try questions arising abroad, and the fiction used as to laying the venue, says, (page 162), "Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it. But if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action the cause of which arises here, we have jurisdiction, &c. In the very infancy of commerce, and in the strictest times, as I collect from a passage in Brook, Trial, pl. 93, the cognisance of all matters arising here was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it; and in these days we should hardly hesitate to affirm that doctrine." In *Matthews* v *Erbo*, 1 Lord Raym. p. 849 "it was moved to set aside an execution upon an outlawry against the defendant, upon affidavit that the defendant was an alien merchant and lived beyond the sea, and so he will be out of the reach of the law." No objection was ever raised against the jurisdiction of the courts over the subject-matter; the difficulties which arose were always with regard to the mode of procedure. A British subject resident abroad could not be served there with a writ of summons. By a process somewhat intricate and tedious, but well established, he might be sued, nevertheless, to judgment and execution in respect of any causes of action over which the English courts had jurisdiction. The Court permitted a course of procedure against him which ended in his outlawry, and that being once established, the plaintiff proceeded to judgment and to an equivalent for execution against any property of the defendant in England. So with regard to a foreigner and alien, the Courts, by permitting a writ of *distringas* to issue against any property of his found within the jurisdiction, compelled him to appear, or pursued him to outlawry and judgment. And there is no trace of any objection ever having been maintained on the ground that in a transitory action there was no jurisdiction unless every fact necessary to be proved in order to support the action occurred within the jurisdiction. Such being the state of the law with regard to jurisdiction and procedure, the statute in question was passed. It is an Act to amend the process, practice and mode of pleading in the superior courts of common law, &c. It does not therefore, affect to give or to take away jurisdiction, but only to regulate process, practice and pleading in cases already within the jurisdiction. The mischief to be remedied is recited thus:—"Whereas the process, practice and mode of pleading in the superior courts of common law at Westminster may be rendered more simple and speedy; be it enacted," &c. The statute under the heading which precedes section 2, proceeds to deal with personal actions against defendants, whether in or out of the jurisdiction of the court: and in section 2 and subsequent sections deals not with jurisdiction, but with the writ of summons and the service of it in the case of defendants residing, or supposed to reside, within the jurisdiction. Then, by section 18, the statute assumes to deal with the case of defendants being British subjects residing out of the jurisdiction: "In case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons," &c. In thus legislating with regard to the writ of summons, which is the commencement of the suit, there is no restriction or alteration of jurisdiction, and the kind of action is not here mentioned: it is not otherwise limited than by the heading before section 2, to the series of sections from section 2 to section 25, inclusive. The only limitation of kind of action, therefore, is that it must be a personal action. Section 18, then, having dealt with the writ of summons and the issue of it, proceeds to deal with the further continuance of the suit:—"And it shall be lawful for the Court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of a breach of contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made, &c., to direct from time to time that the plaintiff shall be at liberty to proceed in the action," &c. The order of the judge is not an order to enable the plaintiff to bring an action. The action is already brought by the issue of the summons. The court has already assumed jurisdiction if the action be personal and touching a subject-matter within the ordinary jurisdiction of the court. The order in question is an order made in the cause directing that the plaintiff may proceed in the action, that is to say, proceed in the action already previously instituted. Then arises the question in dispute, which is,—What is the meaning of the phrase "a cause of the action?" Now, in the drawing of the Act, that phrase is made applicable to two subsidiary phrases. If the section were expanded, it would read thus: "That there is a cause of action which arose within the jurisdiction or a cause of action in respect of the breach of a contract made within the jurisdiction." In the second collocation the phrase "cause of action" clearly does not mean the whole cause of action as contended for on behalf of the defendant. It means the breach of contract, which breach occurs out of the jurisdiction. But if the phrase "a cause of action," when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? Can the same phrase have two different meanings? Is not the natural reading rather this, that it means the same thing when applied to both? It is that which in popular meaning, and for many purposes in legal meaning, is, "the cause of action," viz., the act on the part of the defendant which gives the plaintiff his cause of complaint. In the first collocation, that is supposed to occur within the jurisdiction, in the second without the jurisdiction. If this be the true construction of section 18, it is also the construction of section 19, which is applicable to foreigners. By so reading the sections they are made applicable only to procedure, and not to jurisdiction. According to the title of the statute, and the recital of what it was intended to improve, they deal with the process and practice of the court. Section 24 shows that sections 18 and 19 are really substituted for the former intricate proceedings on a writ of *distringas* for the purpose of compelling appearance, or for proceeding to outlawry. If the construction contended for by the defendant be admitted, the statute, which is intended to apply only to the simplification of process and practice, is made to apply to jurisdiction; the phrase in the section which has been commented on is made to have two different meanings, and the jurisdiction of the superior court is limited and ousted by words in a statute, which, as it seems to us at least, do not clearly so enact. This last is contrary to a well-established rule of construction. For the reasons thus given, we are of opinion that the invariable practice of this court from the passage of the Act until now, has been and is correct, and that the Master's order in this case, staying further proceedings, was wrong and should be set aside.

*Rule absolute.*

## CHANCERY.

### Wanham v. Machin.

*Mortgage—Sale of mortgaged property—Puisne incumbrancers—Costs of sale.*

In a foreclosure suit by the second of several successive incumbrancers in which a sale was prayed, a decree was made and the estate sold, and the money paid into Court. *Held*, that the costs of the sale were not to be included in the costs of the suit, but each incumbrancer was to add his costs of the sale to his debt and be paid his principal, interest and costs according to priority.

[18 W. R. 1093.]

This was a question as to what was properly comprised in the costs of a mortgagee's suit.

The suit was instituted by a second mortgagee for foreclosure of the equity of redemption in the mortgaged property, but prayed for a decree for a sale instead of foreclosure.

There were incumbrancers subsequent in priority to the plaintiffs. A decree was taken for a sale, and the conditions of sale were prepared by one of the conveyancers to the Court. The conditions required the concurrence of the *puisne* incumbrancers in the conveyances to the purchaser. The property was put up for sale, and sold in lots to seven different purchasers, and the purchase money was paid into court.

The fund in court was sufficient to pay the first mortgagee his principal, interest and costs, but not sufficient to pay the principal, interest and costs of the plaintiffs in full.

It was not disputed that the fund in court must be applied first in payment of the costs of the suit, but the question was whether the costs of the sale as distinguished from those of the suit, and, in particular the cost of obtaining the concurrence of the *puisne* incumbrancers in the conveyances were to be added to the costs of the suit, or each incumbrancer was only entitled to add his portion of such costs to his principal and interest.

*Jessel, Q. C.*, and *Batten* appeared for the plaintiffs, and contended that the proper course was not to include the costs of the sale in the costs of the suit, but for each incumbrancer to add his costs of the sale to his principal and interest. It made no difference that the prayer was for sale and not for foreclosure. They referred to *Barnes* v *Racster*, 1 Y. & C. C. C. 401; *Wild* v. *Lockhart*, 10 Beav. 320

*Tyssen* appeared for the first mortgagee and for the purchasers, but as it appeared that the first mortgagee would be paid principal, interest and costs in full in any case, he took no part in the argument.

*Southgate, Q. C.*, appeared for the *puisne* incumbrancers, and contended that it must be assumed that their concurrence in the sale was required for some sufficient reason, and as the sale was primarily for the benefit of the prior incumbrancers, the costs of it ought to be included in the costs of the suit. He referred to *Hepworth* v. *Heslop*, 3 Hare, 485, and *Upperton* v. *Harrison*, 7 Sim. 444.

Lord Romilly, M R —This is a case of a description which I think, on considering the point, and looking at the authorities, has not yet been decided. The question is this. It is a rule that a mortgagee is entitled to have his costs added to his security, and paid according to the order of priority of his incumbrance The first mortgagee is entitled to his principal, interest and costs in all cases.

There are some distinctions between the costs of a suit and the costs of the sale of property in a suit. One of these distinctions is this. A mortgagee, having a mortgage of the property of a testator or intestate, and being also at the same time an unsecured creditor, files a bill for the administration of the estate, which includes a realization of the mortgage. Then the suit is an administration suit, and not a mortgagee's suit, and the costs are the first charge upon the estate. And if it necessary in the suit to sell the real estate, and the mortgagee consents to the sale, he is entitled to his costs before anything else, but all the costs of the sale are not to be paid in the absence of any arrangement. There may be steps taken which may alter the case. The second mortgagee may only consent on having his costs of the sale. Generally they are so small that the mortgagee agrees that they shall be paid first. Nothing like that has happened here, and I am informed that the costs are very great. I am of opinion, therefore, that the first mortgagee is entitled to have his principal, interest and costs paid first, and the same rule must apply to all the subsequent mortgagees.

In some cases a difference is made where it is necessary to sell certain property, and ascertain the rights of parties, and there are various parties to the sale arising out of different claims upon the real estate But the costs of realizing the real estate ought not in general to be thrown on the proceeds of the sale in the first instance, but the principal, interest and costs of the mortgagee are to be paid before any other person is paid anything.

The only question which arises here is this, where the mortgagee institutes a suit for foreclosure and asks for a sale instead, and thereupon the *puisne* incumbrancers, being parties to the suit, concur, whether the costs of the sale ought not to be paid in the first instance, before the mortgage debt. Now on the whole, and considering all the cases, I do not think that, in the absence of any contract, I can make a distinction between the costs of the sale, and the other costs which a mortgagee is entitled to add to his security. They are both necessary for realizing the mortgaged property. The first mortgagee is entitled to be paid his principal, interest and costs, and I am unable on principle and authority to discover that any distinction ought to be made with respect to subsequent incumbrancers The principle I have referred to regarding administration suits does not apply to the present case, and I only mention it to show that I have not neglected it.

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## Bubb v. Yelverton.

*Ornamental Timber—Equitable waste—Tenant for life and reversioner—Injunction—Damages.*

Although a reversioner is entitled as of right to have the tenant for life restrained from felling ornamental timber, yet, if he wait until after the felling of the timber, he will only be entitled to recover damages where actual damage to the reversion is proved.

[18 W. R. 1146, M. R.]

In February, 1866, the late Marquis of Hastings, the then owner in fee of the Donington Park Estates, contracted with Mr Charles Abney Hastings to sell the same to him reserving to himself a life estate without impeachment of waste, and in August, 1866, the purchase was completed In March, 1866, the Marquis, acting under the advice of Mr. Thomas, an eminent landscape gardener, felled a number of trees growing upon various parts of the property, some of which grew in the shrubbery adjoining the castle These trees consisted of elms, ash, spruce fir, larch, &c., and were sold in one hundred and five lots, producing £338 It appeared that Mr. Hastings, who at the time was, in equity, the reversioner, was aware of this proceeding, but took no steps in consequence. In November, 1866, the Marquis died, and this suit was instituted for the administration of his estate.

Mr Hastings now brought in a claim as reversioner, against the estate of the Marquis, for damages in respect of equitable waste committed by the felling such trees as came within the description of ornamental timber, or timber planted for shelter, and the question now came before the Court upon adjourned summons.

*C C Barber* and *Dauncy*, in support of the contended claim, that the trees felled came within the description of ornamental timber, or timber left standing for shelter, which the reversioner was entitled to have preserved as against a tenant for life without impeachment of waste, it not being shown that the trees felled were either thinnings or doing damage by their standing

*Sir R. Baggallay Q. C.*, *Jessel Q. C.*, *C. Hall*, *Pemberton*, and *Rowcliffe*, for the several parties to the suit, were not called on.

July 29.—Lord Romilly, M. R. said that the law on this question had been misunderstood by the claimant. Where a tenant for life was felling trees planted for ornament or shelter, the reversioner had an absolute right to restrain him; but when the reversioner stood by and saw him fell the trees, and afterwards applied to the Court, the case became one for damages only, and the sole question was how far the inheritance was actually damaged by the felling of the trees. If Mr. Hastings had applied during the felling of the trees, the Court would have granted an injunction, assuming that the cutting of the same was not beneficial to the adjoining trees. But Mr. Hastings had not done so, and the position resolved itself into whether the reversioner had suffered any damage. His Lordship was of opinion upon the evidence that he had not, except, perhaps to one large ash, which, it was said broke the sky line, and was ornamental where it stood. But upon the whole, he was of opinion that the acts of the Marquis had decidedly not been injurious to the property, and he therefore dismissed the summons.

## EXCHEQUER CHAMBER.

### Henkel and another v. Pape.

*Liability for mistake in telegram—Telegraph clerk—Sender of message.*

The defendant, by letter, desired plaintiffs to send him a sample Snider rifle, and added that he could probably fix an order for fifty. A few days afterwards he telegraphed to plaintiffs to send him "three" rifles, but the telegraph clerk, by mistake, telegraphed for "The" instead of for "Three" rifles, and the plaintiffs sent fifty rifles to the defendant, who refused to accept more than three of them.

In an action to recover the price of the forty-seven rifles from the defendant,

*Held*, that the defendant was not responsible for the mistake of the telegraph clerk, and was not liable,

[Ex., 19 W. R. 106.]

This was an action for goods bargained and sold, and for goods sold and delivered by the plaintiffs to the defendant; the defendant, except as to £7 which he paid into court, pleaded that he never was indebted.

The plaintiffs are gun manufacturers, having offices in London and a manufactory in Birmingham; the defendant is a gun-maker at Newcastle.

On the 3rd of June the defendant wrote to the plaintiffs asking them to "send sample Snider, and forward it immediately, as he thought he could fix an order for fifty." The rifle was accordingly immediately sent from Birmingham to the defendant. On the 7th of June the plaintiffs received the following telegram:—"Pape, Newcastle, to Henkel: Send by mail '*the*' Snider rifles same as pattern; must be here in the morning; ship sails then."

The plaintiffs accordingly sent off fifty rifles to the defendant. On the 9th they received the following letter from him:—"I am surprised that you sent fifty instead of three rifles; my telegram was to send 'three.'" The fact was that the telegraph clerk had by mistake telegraphed the word "the" instead of "three." The plaintiffs insisted on the defendant's taking and paying for all the rifles, but he declined to take or pay for more than three. The plaintiffs brought this action. The defendant paid £7 into court as the price of the three rifles, and contended that he was not bound to take or pay for the other rifles, and that he was not responsible for the mistake made by the telegraph clerk.

The case was tried at the last summer assizes at Guildford, before Blackburn, J., when the above facts were proved and a verdict was directed for the defendant, with leave to the plaintiffs to move to enter the verdict for them for £90 15s. less the sum of £7 paid into court.

*Chitty* moved accordingly.—He contended that the telegraph clerk was the agent of the defendant for the transmission of the message, and that the defendant was therefore liable for the mistake; and urged that the defendant had not taken the best means in his power to prevent mistakes, as he might have had the telegraph repeated, as appeared from a notice on the back of the telegraph form in these words—

"Telegrams may be repeated at the request of the sender, if he desires to adopt this extra security against risk of error, by being sent back from the office at which they are received to the office from which they are forwarded. The charge for repetition is one-half the ordinary tariff."

And he also urged that as the Post-office authorities were not liable for the mistake, it followed that the loss must fall on either the plaintiffs or the defendant, and that the latter ought to suffer because he as the sender of the message had entered into a contract with the Post-office authorities, whereas there wes no privity between the plaintiffs as the receivers of the message and the Post-office authorities: *Playford* v. *The United Kingdom Electric Telegraph Company, Limited*, 17 W. R. 968, L. R. 4 Q. B. 706.

**The Court** (Kelly, C B., Bramwell, Pigott and Cleasby, BB ) held that it was clear that the defendant had not entered into a contract for the purchase of the fifty rifles, but had only contracted to purchase three rifles, that the Post-office authorities were only defendant's agents to transmit messages in the terms in which he as the sender had delivered them, and that they had no authority to do more, and that therefore the defendant could not be made responsible because the telegraph clerk had made a mistake in transmitting the message; they accordingly

*Refused the rule.*

## UNITED STATES REPORTS.

## COURT OF APPEALS OF N. Y.

### Herrick v. Woolverton.

A note payable on demand with interest is not a continuing security which becomes due only on demand; it is a debt in presenti, and a third party taking it ninety days after its date takes it subject to all the original defences. *Merritt* v. *Todd*, 23 N. Y., construed.

[2 L. G. 34.]

Appeal from an order of the General Term, Third District, granting a new trial on a verdict rendered at the Circuit, in favor of the defendant.

The action was brought on a promissory note made by the defendant, on the 9th day of February, 1861, for $1,500 on demand, with interest, to the order of H. D. Hawkins, and immediately on the same day endorsed by him, and delivered to Jonathan R. Herrick, who was the original holder of endorsee; who continued to hold it until the 28th of April, or 1st of May, 1861, when he transferred it to his brother, Delaus W. Herrick, the plaintiff.

The note was executed and delivered to Jonathan R. Herrick upon a transfer by him to the defendant of fifty shares of the capital stock of the Bank of Albany. The plaintiff defendant, Hawkins, and Jonathan R. Herrick, were at the time merchants, doing business in Broadway, in the city of Albany; and before the commencement of the action, the defendant duly tendered the stock, and demanded the note, which was refused.

The question of fact litigated at the trial, in regard to the execution and delivery of the note to Jonathan R. Herrick, was, whether as between him and the maker, it was, or was not, without consideration; or rather, whether it was given, as the defendant claimed, as a mere memorandum, by way of security for the return of fifty shares of the capital stock of the Bank of Albany, borrowed by the defendant from Jonathan R. Herrick; or, as claimed by the plaintiff, given to secure the payment for said fifty shares of stock purchased of said Herrick by the defendant. The plaintiff claimed that it was a sale of the stock, and that the note was given for the purchase price. The defendant claimed the transaction was a mere loan of the stock, to secure the return of which the note was made. Upon this issue the evidence was conflicting. No evidence was given by either party to show whether or not the plaintiff before, or when he took the transfer of the note, had any actual notice of the claim of the defendant; that it was executed to secure the return of the stock, or to shew whether or not the transfer of it to him from Jonathan R. Herrick was for a valuable consideration.

The court charged the jury among other things, that the note having been given nearly three months before it was transferred to the plaintiff, and all the parties living in the same street, doing business with each other, it was notice to the purchaser to inquire as to the note; and if he failed to make such enquiry, the note was open to any defence existing between the original parties. To which the plaintiff's counsel excepted.

The counsel for the plaintiff asked the court to charge that the note being payable on demand, *with interest*, it was a continuing security, and did not become due until an actual demand was made. The court refused so to charge, and the plaintiff's counsel excepted.

The jury found that the transaction was a mere loan of the stock, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose, and rendered a verdict for the defendant.

The plaintiff made and served a bill of exceptions, which was ordered to be heard in the first instance at the General Term, where a new trial was granted, with costs to abide the event, and the defendant appealed to this court, pursuant to the last clause of subdivision 2, sect. 11, of the Code.

Opinion by Foster, J. Delivered March, 1870.

The jury having found that the transaction between the defendant, who was the maker of the note, and Jonathan R. Herrick, who was the real payee or first holder, was a mere loan of the bank stock from the latter to the former, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose, they virtually found that the paper, though in form a promissory note, was never intended as such between them; that it was issued to be used only for the purpose above specified, and was never intended by them to be issued, used, or circulated as a *promissory note*, and doubtless, as between them, it could not be claimed to be such; at least, unless default should be made by the defendant in the return of the stock, and it cannot be claimed, upon the evidence in the case, that such default had been made.

An important inquiry, therefore, is whether at the time the note was transferred from the payee to the plaintiff, it had become due, in such sense as to be dishonored; for if it was, then the plaintiff took it subject to all equities between the payee and maker, and he could not recover upon it, even though he took it without any actual notice of the defence and for a valuable consideration; for in such case the law implies notice to him of all exising equities or defences which the maker had to it as against the payee, and such presumption is conclusive.

If, therefore, the note was dishonored when the plaintiff received it, the charge of the judge and his refusal to charge as requested by the plaintiff's counsel were correct. This proposition of law is not disputed, and is well established.

The uniform consent of authority in this State was, that a note payable on demand must be presented within a reasonable time, or it would be deemed due and dishonored, so that a negligent transferee would take it subject to all equities existing between the original parties; and that the rule applied, whether the note was payable *with interest* or not. *Furman* v. *Haskins*, 2 Caine, 369; *Losee* v. *Durkin*, 7 J. R. 70; *Sice* v. *Cunningham*, 1 Cowen, 397, where the same rule was held between subsequent holder and endorser. And *Wethey* v. *Andrews*, 3 Hill, 582, gives the same rule as applicable to notes on demand, *with interest*, holding that a note on demand with interest is a lasting security, but applying the rule to it that the demand must be made within a reasonable time; and says, that notes on demand, without interest, are due immediately.

The rule, as to reasonable time, which has been applied to such notes, has been quite different from the rule, in that respect, applicable to checks, as between drawer and holder, and to drafts or bills of exchange, as between drawer or endorser and holder, which requires them to be presented without delay. The rule as to such notes, requiring them to be presented within such time, as under all the circumstances of the case, and the situation of the parties, the court shall adjudge as matter of law, to be reasonable between them. In *Furman* v. *Haskins*, the note was held dishonored, where the transfer was made eighteen months after its execution. In *Losee* v. *Durkin*, where no special circumstances appeared, the court held, where the note was transferred two and a half months after it was executed, that in an action brought thereon by the transferee, the maker might prove a payment, made while it remained in the hands of the payees, and in that case the note was payable *with interest*.

In *Sice* v. *Cunningham*, where the action was by the endorsee against the endorsers, it was held, that a note payable on demand, was due presently, and must be demanded within a reasonable time, and that a delay of five months in making demand of the maker, discharged the endorser; and the court also held, that proof of a parol agreement to vary the time of payment fixed by the note, could not be received.

In *Wethey* v. *Andrews*, the Supreme Court, for the first time noticed any distinction between demand notes, with or without interest. That was an action of the subsequent holder against the maker of a note on demand with interest. It was transferred from the payee to one Grimshaw, a purchaser thereof, within a week after it was executed, and within about a month after its execution he transferred it to the plaintiff, who paid him the money for it. The defendant, the payee and the first transferee, all lived in the same village, and the plaintiff lived within two and a half miles of them; and the defence offered was, that the note was executed without consideration. The plaintiff recovered, the court holding that the cases furnish no principle for fixing the time with exactness, when a negotiable note, payable on demand, shall be deemed dishonored, so as to let in a defence against the payee, as against one to whom it has been negotiated; that the note was *with interest*, and came to the hands of the plaintiff some four or five weeks after it was executed, and that no law adjudges such a note to be dishonored so soon after its date. In delivering the opinion, Cowen, J., says in substance, that if the note had not been on interest he should have thought it right to presume it had been demanded and payment refused, perhaps even at the time when Grimshaw obtained it; but he thought the contrary was to be presumed with regard to one which bore interest, and thought it would be contrary to the general course of business to demand payment short of some proper time for computing interest. He also cited the case of *Barough* v. *White*, as reported in 6 Dowl. & Ryland, and in 4 Barn. and Cres., as showing that such a note in England is considered as a continuing security and is not dishonored until payment is demanded and refused; but we are not informed that the court adopted that rule, and the whole case shows that it was meant to decide, and that such a note is not due or dishonored immediately.

Now, the precise question before the court in *Wethey* v. *Andrews*, was whether, in an action by a subsequent holder upon a note on demand, with interest, transferred by the payee *within a week* after its inception, the maker could set up the defence existing between him and the payee that the note was without consideration, upon the sole ground that it was dishonored by the delay of a week without demand for payment. The court was doubtless correct in its decision, and correct in saying that there was no case holding such a note to be dishonored; and in that respect, I think there is no distinction, in the cases to which the court alluded, between such notes and those payable on demand, without interest; for I am not able to find any case which declares a note on demand, without interest, dishonored by not being demanded or paid within a week after it is executed; and although, in the opinion, the judge treats the the case as though the material transfer took place four or five weeks after the making of the note, it is actually certain that no such question was involved; for it is perfectly clear, upon principle and authority, that if the transfer to Grimshaw was before the note was dishonored, the subsequent holder would succeed to all his rights as between him and the maker, irrespective of all questions of notice to or of valuable considerations paid by such subsequent holder. It would seem that the judge supposed that the rule held in the case of *Barough* v. *White*, which he cited, was different in England in regard to notes on demand, *with interest*, from what it was in regard to demand notes not on interest; and if so, I think he was mistaken. But whether the *opinion* expressed by the judge in *Wethey* v. *Andrews* was correct or not, it must be conceded that the law of that case was correctly decided.

The Supreme Court, in the case at bar, followed what was supposed to be the principle adopted by this court in the case of *Merritt* v. *Todd*, 23 N. Y. 28. It is doubtless true that this court held, in that case, that a promissory note, payable on demand, with interest, is a continuing security; that the endorser remains liable until an actual demand of payment; and that the holder, as between him and the endorser, is not chargeable with neglect for omitting to make such demand within any particular time; and whether the reasoning upon which the decision was based be correct or not, such is the decision of this court. It, however, only *decides* what the law is between holder and endorser; and the chief judge, in his opinion discriminates between that case and such as the one before us, and says: "It may be well to observe that the present question is not identical with the one which arises when, after the transfer of such a note, the maker seeks to introduce a defence existing against the first holder. The lapse of time, or the non-payment of interest after the regular period, or period for such payment have passed, may be sufficient to put the purchaser on inquiry, or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, *that a demand had been actually made and notice given to the first endorser, so as to charge him, while at the same time the maker would be let in to defend, if he had any defence.* Questions of charging the endorser, therefore, and questions of allowing an original defence to the maker may depend on very different considerations." In other words, that, as to the maker, the note might be considered dishonored, while, at the same time, as between the holder and endorser, the former has been guilty of no laches.

It is clear to my mind, that this court did not intend to decide what the rule should be as between maker and holder, but only as between holder and endorser, and therefore it cannot be claimed, as the Supreme Court seemed to suppose, that their decision in the case before us was required and controlled by the case of *Mer-*

*ritt* v. *Todd.* Nor does it prevent us from determining the questions presented here, according to the decisions in other analagous cases. In fine, it decides nothing in regard to such notes, as between maker and holder. And I am not aware of any case in this court, or in the Supreme Court, except the decision in this case of the court below, which in terms dissents from the ruling in *Losee* v. *Durkin*, or attempts to overrule it; and that case which was decided in 1810, held that such a note as this was dishonored when it had been held by the payee for two months and a half, so as to let in the defence against the subsequent holder, by payment to the first holder, while he owned the note.

It may be, that, as against an endorser of such paper, he may be holden, though the maker should have a defence arising between him and a first holder of it, for the reason that, by endorsing the note, he submits his liability without any certain fixed limits as to time, and to some extent consents to have his rights affected by the action of both maker and holder, even though as between *them*, it is due at once, so that the maker may pay it at any time; and the holder may demand payment, or sue the maker without demand at any time; that having endorsed such paper he has no right to complain that neither of them has taken such steps as to retire the note, or fix his liability at an earlier day.

It must be conceded, that under the rule which has obtained in this State, there has always been some doubt and uncertainty when such a note as this would become dishonored by want of demand or non-payment; but such uncertainty need not subject parties to any risk, where due caution is exercised.

I think it is not correct to say that such notes are *intended* for circulation from hand to hand as commercial paper. It is true that they do so circulate to some extent; but, generally, the notes which are issued and used for circulation are payable at a certain day, and in regard to which all the parties know when and how the liabilities of endorsers are to be fixed or discharged.

There is no good reason why such notes should circulate as commercial paper, any more than that paper payable at a time certain, and which is past due, should perform that office; for both alike must be paid whenever the holder requires it. And why should either kind be circulated? The obligation of the maker of either has matured, or, at farthest, matures on demand, which in both cases may be made at once; and if the holder wants to raise money on them, why not apply for payment, and receive it from the party from whom it is due, instead of selling it to some one else, who may the next moment make such demand? The very fact that the holder of such paper offers it for sale or circulation, seems to imply that there is some reason not apparent why he does not demand its payment of the maker. And surely no one can doubt that such paper *is* legally payable immediately after it is issued, if the holder demands it.

Independent of authority, the application of the rule which is held between holder and endorser in *Merritt* v. *Todd*, to the case of holder and maker would leave the time when the note would be payable quite as uncertain as it would be when it becomes dishonored under the rule as claimed by the appellant, while all the maker's actual intentions in issuing the paper might be frustrated; and he must have no right to pay it until the holder choose to demand it. For it cannot be that such note, as against the holder, is not payable until he chooses to demand it; and that, at the same time, the maker may pay it when he pleases. The rule adopted in *Merritt* v. *Todd*, as applied to the endorser, is that the note is due *only on actual demand*, and if it is applied as against the maker, it must be accompanied with all its legal consequences; and, of course, while the holder can require payment sooner or later, as he chooses; the only certainty on the part of the maker is, that he must be certain to have the money ready whenever it is called for, and yet continue liable to pay interest without any right to compel the holder to receive payment until he chooses to do so. And while such rule will enable the holder to carry out any intention that *he* may have had, to loan his money for such a time as is usual when made on the security of commercial paper, it affords no safeguard against a change of such intention on his part, and leaves any such intention of the maker without any protection whatever; for the note is due when demanded. The holder may be as vigilant or negligent as he pleases. The maker and endorser are bound to wait his time; and the only law of the case is his will. If we adopt it in this case, we should change the well established principle, that as to such a note, the statute of limitations commences to run from its date, so that it should commence only from the time of demand made, and thus add still farther to the security of the holder, and to the prejudice of the maker.

I think the case of *Merritt* v. *Todd* has extended the principle of continuing security in such a case to the very verge; and that to apply it between holder and maker would be putting the maker in the power of the holder to an extent which is entirely unnecessary. If it is the intention of parties that paper executed between them shall be a continuing security, and as a promissory note for the term of time at which interest is annually computed, it is much better that the paper should be made in such form as shall evidence such intention more clearly, and to give the parties the benefit of it, than to change the law so as to benefit the holder only.

In this country the law is, that a promissory note, payable on demand, unless demanded within a reasonable time, is considered as overdue and dishonored: *Ranger* v. *Cary*, 1 Metc 369; *Croswell's Executors* v. *Arrot*, 1 Sergt. & R. 180; *Loomis* v. *Pulver*, 9 J. R. 244; *Van Hoesen* v. *Van Alstyne*, 3 Wend. 75, 79. And the rule is the same even if expressed to be payable with interest; *Thompson* v. *Hale*, 6 Pick. 259: *Sylvester* v. *Crapo*, 15 Pick. 92; *Newman* v *Kettelle*, 13 Pick. 418; *Wight* v. *Foster*. 13 Pick. 419; *Nevins* v. *Townsend*, 6 Conn. 5; *Losee* v *Durkin*, and *Sice* v. *Cunningham*, *infra*. And, as in this State, no absolute measure of this reasonable time has been fixed. A day or two (*Field* v. *Nickerson*, 13 Mass 131, 137), seven days (*Thurston* v. *McKenn*. 6 Mass. 428), and even a month (*Ranger* v. *Cary*, 1 Metc. 369), is not too long. While eight months (*American Bank* v. *Jenness*, 2 Metc. 288; *Ayers* v. *Hutchins*, 4 Mass. 370), three months and a half (*Stevens* v. *Brice*, 21 Pick. 193). and even two months and a half (*Loses* v. *Durkin*, 7 J. R. 70; and *Sice* v. *Cunningham*, 1 Cowen, 397, 404), have been deemed sufficient to discredit a note.

The statute of limitations commences to run from the date of a note payable on demand, whether without interest: *Newman* v. *Kettelle*, 13 Pick. 418; *Larson* v. *Lambert*, 7 Halst. 247; *Kingsbury* v. *Butler*, 4 Verm. Report, 458, or whether it be with interest: *Mason* v. *Mohawk Ins. Co.* 18 Wend. 267.

Cowan, J., in *Wethey* v. *Andrews*, and the chief judge, in *Merritt* v. *Todd*, appeared to suppose that in regard to the time when demand notes became due, there was a difference in England between those payable with interest and those on demand merely. And yet I think it will be found that no such distinction prevails there.

Formerly notes on demand were held to be due immediately: *Coop* v. *Doncaster*, Cro. Eliz 548 Where it was contended that the said demand was parcel of the contract, so that the money was not due until demand, and that a demand by bringing the action would not do, but the court said, the duty of payment was "a duty maintained,'and, therefore, these need no demand, as in other cases:" *Remhall* v. *Boyle*, 18 Modern Rep. 38. Where in an action upon a note payable on demand, it was moved in arrest of judgment that no demand was alleged in the declaration; but the court held it to be a debt *in yrocenti*, and that it was a debt plainly precedent to any demand. *Collins* v. *Demming*, 3 Salk, 227, decides the same point, and also holds that the statute of limitations commenced running from the date of the note. And 15 Viner's Abr. 103, note, is to the same point.

It is assumed that the rule in England now is, that a note payable on demand with interest, is a lasting security, and is not dishonoured until payment is demanded. In *Barough* v. *White* (as reported in 4 Barn & Cres. 325), which contains a report of what was said by each of the judges, the question was whether in an action brought by a subsequent holder of a note, on demand, with interest, for which he had paid value, the maker should be allowed to prove the declarations of the first holder while he owned it, that he gave no consideration for it to the maker. It was held that such declarations could not be given. And Bailey, J., in his opinion, says: "In this case no demand was proved, and the note being made payable with interest, to Arnott or order, makes it probable that the parties contemplated that the note should be negotiated for some time." And he also said, that the defendants did not identify the first holder with plaintiff, and that for these reasons the evidence was properly rejected. The three other judges placed their decision on the ground, that the declaration of a prior holder of a note cannot be given in evidence against a subsequent one, but that such alleged facts must be established by other proof. And such is the well settled law in this State. It is true that Littledale, J., also said he thought the note not overdue, and that it seemed to him that it was a lasting security. He, however, does not allude to the fact that it is with interest; and Holroyd, J., says it was not overdue, "for a note payable on demand is not open to the same suspicion, as a note overdue which is made payable at a particular time." In *Brooks* v. *Mitchell*, 9 Mees. & Wels. 15, it was decided that a promissory note payable on demand, with interest, was not to be treated as overdue, so as to affect an endorsee with any equities against the endorser, merely because it was endorsed several years after its date. Not an allusion is made by any member of the court that the note was on interest, and Parke, B., reiterates the assertion, that a promissory note payable on demand, "circulates for years," and "is current for any length of time." And the syllabus of the case takes no notice that the note was with interest.

But I have said, that in England there is no difference, in this respect, between notes on demand with interest, and notes on demand, merely. And I think the manner in which these two cases are treated by the judges, shows that they understood the rule to be, and that they were only applying the same rule to these notes, which they consider applicable to all other notes payable on demand In *Haywood* v *Watson*, 4 Bingham, 496, the action was against the maker on a note as follows: "On demand, I promise to pay to Cyrus Morrell, or order, £1,000, value received" Which passed to the plaintiff as subsequent holder long after it was executed, and the defendant attempted to set up a defence to it as against the first holder. But the court ruled that the plaintiff was entitled to recover on the ground, that when the plaintiff took the note it was not dishonored. And Parke, J., said "For though the note was made in 1824, it was payable on demand, and therefore could not be esteemed overdue till demand had been made." And the note was not with interest. I do not know how the English decisions on the subject are to be reconciled, for these cases hold, in conflict with the previous decisions, that all demand notes are continuing securities, and are not overdue or dishonored until actual demand, and yet they continue to decide that the statute of limitations commences to run against them from their date: *Norton* v. *Ellam*, 2 Mees & Wesb. 461. The action was on a note by which the maker promised to pay £400 on demand with simple interest, and the only question presented to the court was, whether the statute ran from the date of the note or from time of the demand. The counsel attempted to draw the distinction that the note was payable with interest, and therefore could not be due immediately, but the Court of Exchequer unanimously repudiated the idea, and say: "Then is there any difference when it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*" And as to notes payable on demand that do not stipulate for interest, the English decisions are uniform in declaring that the statute commences to run from their date.

I think, upon principle and authority, the note in question was dishonored at the time it was transferred to the plaintiff. And that neither the wants or convenience of business call for any change of the rule.

The charge of the judge therefore, and his refusal to charge as requested, were correct. The order of the General Term should be reversed, and the judgment rendered for the defendant on the verdict.

For reversal, Earl, C.J., Grover, Hunt, Foster, and Smith, JJ.

For affirmance, Lott and Sutherland, JJ.

Order of General Term reversed and judgment for defendant.—*American Law Times.*

## GENERAL CORRESPONDENCE.

### *Payment into court—Costs—C.L.P. Act and Rule of Court.*

To the Editors of the Law Journal.

Dear Sirs,—In reading Mr. Harrison's new Common Law Procedure Act, a discrepancy struck me as existing between section 102 of the Act and Rule 12, in regard to payment into Court. According to the section in the Act it would seem as if a defendant succeeding on the issue as to the balance of the claim over and above amount paid into court, would be entitled to the whole costs of suit, although the Rule says the costs would commence with "instructions for plea."

Further, by the section, if the plaintiff does not accept the amount paid into court in satisfaction, it would seem to be implied, that he would not be entitled to any costs, whereas the Rule gives costs up to payment into court. Has the point ever been decided in our courts?

There seems to be a difference between the English Act and ours (sec. 99), as our Act allows payment into court without a judge's order only in case of a *sole* defendant. The English Act is worded differently, and applies as well when *all* of the defendants pay in, the only necessity for an order being when such payment is made by one or more of several defendants.

Supposing a plea of *tender*, and payment into court on that plea, what is to prevent a plaintiff from taxing costs under the Rule?

Yours truly, A Barrister.

[We do not doubt but that there is an inconsistency between the section and Rule of Court referred to by our correspondent. The section appears to relate to a case where payment of money is pleaded in bar of the cause of action, which, if plaintiff refuses to accept in satisfaction, and there is only one issue, viz., the issue as to the sufficiency of the payment, if found for defendant, entitles defendant to judgment and costs of suit. The rule appears to apply to a case where, besides the issue on the plea of payment of money into court, which money the plaintiff accepts in satisfaction, there are other issues in respect of other sums, or other causes of action in the same action, and defendant succeeds in defeating the residue of the claim, in which case he is entitled to the costs of the cause in respect of the defence commencing at "instructions for plea," but not before.

This we take to be the distinction between the section of the Act and the Rule of Court.

When the money paid into court is accepted in satisfaction, and the only issue is on the plea of payment into court, plaintiff is entitled under the section to the costs of the suit. If other issues, then plaintiff is entitled under the Rule of Court to the costs of the cause in in respect to that part of his claim so satisfied, not to the time the money is paid in and taken out, without reference to the other issues.

Eds, L. J.]

### *Husband and wife—Trespass.*

To the Editors of the Law Journal.

Gentlemen,—Can you give me any information upon the following point: A., an infant having a guardian appointed by Surrogate Court, marries. Before coverture a trespass is committed upon real estate of infant. In whose name can the suit be brought? Must the husband necessarily be a party? Can the infant sue in her own name by her guardian, ignoring the husband?

An answer to the above will greatly oblige,

An Old Subscriber.

County of York Winter Assizes will commence on the 9th January, 1871.

The Commissioners to revise the Statutes of the United States—Messrs. Chas. P. James, Benjamin Vaughan Abbott and Victor C. Barringer—have organized this Fall in Washington, and are pursuing the work assigned them. That task is no less than a complete rewriting of all the general and permanent laws of the United States upon a new and orderly arrangement, and with corrections embodying all the repeals and amendments; in fact, the law "as it is" of the National Goverment. Such tasks are usually prosecuted upon the plan of assigning to each Commissioner one share of the entire field, which he works out alone, and submits to his colleagues for revision. The Washington Commissioners are pursuing a different method. They meet daily as a board, and are examining the statutes, section by section, in their order, beginning with the latest, for the purpose of determining as to each section, whether it has been repealed or amended, whether it is of general importance, warranting its being incorporated in the new statutes, and under what chapter of the new arrangement it ought to go. The sections are marked in the margin, and, as the work proceeds, are to be cut out by a clerk, and assorted to the proper chapters. This preliminary labor will give each Commissoner a reliable collection of the existing provisions of law which the board have deliberately decided should be embraced in any chapter which he undertakes to draft, with memoranda of most of the repeals and amendments. This must very much facilitate the ultimate revision. The Bench and Bar of the country will be glad to know that it is the intention of the Commissioners to prosecute the work to completion at the earliest possible date.—*Legal Intelligencer.*

[It is somewhat amusing to see the great similarity between the editorial remarks on this subject in different legal papers in the United States. Whether the original article was written for the *Legal Intelligencer*, the *Pittsburgh Legal Journal*, or the *Chicago Legal News*, or whether inspiration was obtained by all three from another and a common source, it is impossible to say. It is strange at least that the language is almost identically the same in each.—Eds. L. J.]

Court of Error and Appeal.—This Court will, on the 12th January, 1871, hold sittings for the hearing and disposal of the cases mentioned in the following list. Also give judgment in cases previously argued, and dispose of such other business as the Court in its discretion shall see fit:—Williamson v. The Grand Trunk Railway Co.; Mossop v. Mason; Barrie v. Gillies; Fox v. Lipps, Stewart v. McKindsey; Bank of Toronto v. Fanning; Butler v. Church; Abell v. McPherson; Chisholm v. Emery; Bank of Montreal v. McFaul; Cameron v. Sanderson; Morley v. McKay; Barker v. Torrance.

The following are the rules and regulations made by the Governor General in Council, pursuant to the provisions of 32, 33 Vic., Chap. 29, Sec. 118, to be observed on the execution of the judgment of death in every prison, as well to guard against any abuse in such execution, as to give greater solemnity to the same, and to make known, without the prison walls, the fact that such execution is taking place.

1.—For the sake of uniformity it is recommended that executions should take place at the hour of eight o'clock in the forenoon.

2.—The mode of execution, and the ceremony attending it, to be the same as heretofore.

3.—A black flag to be hoisted at the moment of execution, upon a staff placed upon an elevated and conspicuous part of the prison, and to remain displayed for one hour.

4.—The bell of the prison, or, if arrangements can be made for that purpose, the bell of the prison, or other neighbouring Church, to be tolled for fifteen minutes before, and fifteen minutes after the execution.

Compensation for Railway Accidents.—Facts and figures can be made to prove anything, but at times they are stubborn impediments to a theory or an idea. We last week gave a report, which had been deferred for want of space, of the debate at the Social Science Congress, raised upon the well-known paper of Mr. Brown, Q. C., on compensation for railway accidents. Ingenious arguments were advanced by many persons of note, but at the end comes Mr. T. Y. Strachan, who puts really a new colour on the whole subject. He says in effect to the railway companies of England this: 'You complain that you—that is, your shareholders—are mulcted enormously in these compensation cases. But if you had a fund of one farthing per passenger by way of an insurance against such claims on you, the money would be very nearly enough to clear off all your liabilities. The sum of one halfpenny per passenger would clear your liabilities and give you a handsome surplus. Do not say that one farthing or one halfpenny is an enormous tax. Your average fares are 2*s.* 10*d.* for first class, 1*s.* 4½*d.* for second class, and 10¼*d*, for third class passengers. As to saying that your losses by these compensations impair your dividends, the sum thus taken from you is only 1¾*d.* per cent. on your passenger traffic, and but 2*s* 8*d.* upon two hundred and thirty millions of paid-up capital. If you consider that you have got plenty of money, and the best of counsel and attorneys to detect and expose fraud, you are not exactly the people for whom the Legislature is to pass exceptional Acts of relief.'

Richard A. Dawson, the colored graduate of the Law Department of the University of Chicago, was lately awarded a certificate of good moral character by the Superior Court of Chicago, with a view to his future admission to the bar, upon the motion of B. W. Ellis, of the Chicago bar, who was formerly a slaveholder in the State of Arkansas. Verily the world moves.

# INDEX.

PAGE

- Accidents, Liability for—Editorial ... 197
- Accomplice, Evidence of, in Extradition Case ... 98
- Action, Cause of, where it arises ... 325
- Acts of last Session—
  - Justices of the Peace, Duties of, as to Summary Convictions ... 173
  - Notes, Promissory and Bills of Exchange ... 172
  - Supreme Court Act ... 200
- Advice to Law Students—Selection ... 226
- Affidavit, to hold to bail—Entitling ... 294
- Agent—Power of executor to appoint before probate ... 182
- Alabama Claims, The ... 6
- *Albany Law Journal*—Notice of ... 84
- *American Law Register* " ... 84
- *American Law Review* " ... 83
- Amendment—
  - Re-service in case of ... 180
  - Return to Writ of Execution after sale ... 262
- Appearance—
  - By infant ... 184, 264
  - By married woman ... 41
- Appointments to Office ... 28, 140, 168, 280
- Appraisal—Appeal from Collector's valuation ... 321
- Arbitration—
  - Ontario and Quebec—Editorial on ... 197
    - Report of proceedings ... 212
  - Staying proceedings under C. L. P. Act, sec. 167 ... 292
  - Arbitrator—
    - Duties of, as to notice of meetings—*Ex parte* proceedings ... 125
    - Power of, as to certificate for costs ... 180
- Arrest—Setting aside—Title of affidavits—Sufficiency of material ... 294
- Assessment—Appeal from Court of Revision—Time for—Practice ... 295
- Assizes, 1870—
  - Spring ... 56
  - Autumn ... 224
  - Winter (York) ... 335
  - Ceremonies in England, at opening of ... 312
- Attachment—
  - Sufficiency of affidavits for ... 9
  - Assignment—Notice to garnishees ... 263
- Attorneys admitted—
  - Hilary Term, 1870 ... 82
  - Easter Term, 1870 ... 118, 146
- Auction—Employment of puffer ... 42
- Award.—*See* Arbitration.
- Attachment—Affidavits for must be definite ... 9
- Bar, Calls to—
  - Hilary Term, 1870 ... 170
  - Easter Term, 1870 ... 118

PAGE

- Bench and Bar—
  - The season's work—Mr. *Dalton's* appointment ... 225
  - Recent judicial appointments in Chancery ... 4
  - *Bench and Bar*—Notice of ... 84
- Benchers, The, and the Law Society—Editorial on ... 1
- Bills and notes—
  - Continuing security—Debt ... 380
  - Stamps on—State of the law respecting ... 144
- *Blackwood* for December, 1869—Notice of ... 27
- *Blake, Hon. Wm. Hume*—Obituary notice ... 281
- Call, Examination for—
  - Hilary Term ... 32
  - Easter Term ... 118
- *Canadian Illustrated News*—Notice of ... 168, 232
- Carrier—Duration of responsibility ... 315
- Cause of action, where it arises—
  - English C. L. P. Act, 1852, secs. 18, 19 ... 325
- Challenging the array—Selection ... 224
- Chambers, Common Law—*See* COMMON LAW CHAMBERS.
- CHAMBER DECISIONS—
  - *Bonathan* v. *Bowmanville Manufacturing Company*—Patent—Injunction—Damages 100
  - *Brown* v. *McGuffin*—Attachment—Assignment—Notice ... 268
  - *Caldwell, Re*—Extradition—Habeas Corpus—Felony—Evidence of accomplice ... 227
  - *Commercial Bank* v. *Harris*—Issue Book—Amended pleadings ... 131
  - *Cooper, In re*—Coroner's inquest on Sunday ... 317
  - *Davidson et al* v. *Grange*—*Fi. fa.*—Irregularity—Vexatious levy—Improper affidavit ... 318
  - *Donelly* v. *Tegart*—C. S. U. C. 128, ss. 3, 8—Setting aside proceedings—Laches—Jurisdiction of officer presiding in Chambers ... 291
  - *Edwards et al.* v. *Bennett* (Practice Court)—Ejectment—Re-entry by defendant ... 36
  - *Florey* v. *R. C. Bank*—Costs—Election by plaintiff to reduce verdict ... 317
  - *Grover & Baker Sewing Machine Co.* v. *Webster*—Com. to examine party to suit as witness—Evidence Act, 33 Vic. c. 13 (Ont.) ... 180
  - *Hartleb* v. *Phelan*—Declaration omitting plaintiff's name—Irregularity ... 318
  - *Hatch* v. *Rowland*—*Fi. fa.*—Stock in incorporated company ... 228
  - *Kinne, In re*—Custody of infant—Right of father ... 96
  - *Lewis* v. *Teale*—Several pleas without leave—Interlocutory judgment ... 181
  - *Macaulay* v. *Neville*—Dower—Infant defendant—Next friend ... 264
  - *Macklem* v. *Durrant*—Witness, privilege of from arrest ... 11
  - *McInnes* v. *Western Assurance Co.*—Arbitration—Staying proceedings—C. L. P. Act, sec. 167 ... 292
  - *McMurray* v. *Grand Trunk Railway Co*—Short notice of trial "if necessary" ... 294
  - *McPherson* v. *McPherson*—Taking case down to County Court—"Liquidated" amount 266
  - *Molloy* v. *Shaw*—Arrest—Setting aside—Title of affidavit—Sufficiency of material ... 294
  - *Montgomery* v. *Gale*—Change of venue—Preponderance of convenience—Action on money counts ... 18
  - *Orok* v. *Garvin* (Practice Court)—Certificate for costs under 31 Vic. c. 24, s. 1 ... 62
  - *Potter* v. *Knapp, In re*—Arbitration—Notice of meetings—Proceeding *ex parte*—Costs ... 125
  - *Reg. ex rel. Flater* v. *Van Velsor*—Qualification of municipal candidate—Incumbrances 151
  - *Reg. ex rel. Ford* v. *McRae*—Treasurer—Annual appointment—Notice to electors of disqualification ... 84
  - *Reg. ex rel. Gibb* v. *White*—Eligibility of Indian for election as Reeve ... 153
  - *Reg. ex rel. Halsted* v. *Ferris*—Declaration of qualification, 29, 30 Vic. c. 51 ... 266
  - *Reg. ex rel. McGouverin* v. *Lawlor*—*Quo warranto* summons—When applicable ... 128
  - *Reg.* v. *McLeod*—Change of venue in criminal cases ... 64
  - *Reg.* v. *Robinson*—Extradition—Evidence—Depositions—Admissibility of ... 93

**Chamber Decisions**—(*Continued.*) PAGE

*Reg.* v. *Reiffenstein*—Extent—Commission to find debts—Affidavit of danger—Felony and civil remedy ... 38
*Robertson* v. *Glass*—Embarrassing plea—Immaterial averment—Duplicity ... 11
*Robson* v. *Warren, et al.*—Insolvency—Misdescription of creditor in schedule ... 14
*Roche* v. *Patrick*—Change of venue—Balance of convenience—Fair trial ... 129
*Royal Canadian Bank* v. *Matheson*—Disposal of property by insolvent—Attachment. 9
*Scott* v. *School Trustees Section* 1 *Burgess and Section* 2 *Bathurst*—Amending return to *fi. fa.* ten years after sale ... 262
*Smith* v. *Smith et al.*—Power of arbitrator to certify for costs ... 180
*Stacey* v. *McIntyre* (Practice Court)—"New trial on payment of costs"—When to be paid ... 127
*Union Permanent Building Savings Society* v. *Citizens Insurance and Investment Company*—Foreign corporation—Service of process—*Locus contractus* ... 181
*Westover* v. *Brown*—Striking out issues after demurrer ... 130

Chancery Judges, The new—Editorial ... 4
Chancery Reforms—Editorial ... 29
Chancery Sittings, 1870 ... 28, 56
Change of Venue—
Balance of convenience ... 13, 129
In criminal cases ... 64
Children, custody of—Right of father ... 96
China, Extraordinary trial in ... 87
Clerical disabilities—The Bill for their removal—Selection ... 124
Commission to examine witnesses—
Costs of ... 154
When granted since Evidence Act ... 180
Common Law Chambers—
Editorial ... 31
Jurisdiction of Clerk of Queen's Bench ... 291
*See* **Chamber Decisions.**
Common, Tenants in—*See* **Tenants in Common.**
Consent, Order by, a bar to second action—Fraud ... 43
Contraband of war—Selection ... 254
Contract—Construction of—Place of making ... 181, 196
Conviction, Summary—New Act respecting ... 173
Coroner's inquest on Sunday, invalid ... 317
Corporation, Foreign—
Place of business of ... 320
Service of process on ... 181
Corporations, Municipal—Liability for neglect to repair ... 297
**Correspondence**—
Alderman of city, can he issue Police Court summons ... 224
Barristers and Attorneys—Partnership ... 334
Clerk of Peace—Fees—Adjourned Sessions ... 138
Costs, Division Court, certificate of ... 28
Discharge in insolvency—Confirmation ... 223, 254
Fees to Clerk of Peace ... 138
Harrison's new C. L. P. Act—Payment into court ... 335
Husband and wife—Trespass to infants' estate ... 335
Insolvency—Confirmation of discharge when not opposed ... 223
Indictment—Form of—Technical objections ... 196
Jury—Trial before Quarter Sessions for sale of liquor on Sunday—Appeal ... 224
Nuncupative Wills ... 27
Police Court summons—Can city alderman issue ... 224
Wills, Construction of—The Canadian Domestic Lawyer ... 252
Correspondents, Answers to ... 56, 224

Costs— PAGE
  - Certificate for, when only nominal damages awarded ... 62
  - Certificate for, Power of arbitrator as to ... 180
  - Division Court—Certificate for ... 28
  - New trial, on payment of—When to be paid ... 127
  - Commission to examine witnesses abroad ... 154
  - Of Foreclosure Suit—What are ... 328
  - Security for, when should it be exacted ... 61
  - When plaintiff elects to reduce verdict ... 317

County Court—
  - Taking cause down to—Liquidated amount ... 266
  - (English)—Notice of appeal from—Waiver ... 239

County Judges Criminal Courts discussed ... 87, 93
County Judges—Decisions of, will not be reviewed by Superior Court Judge ... 294
Criminal Law Consolidation—Editorial on ... 57
Criminal Trials without Juries—Effect of the enactment ... 87, 93
Curious tenures ... 56, 112
Curran's readiness of repartee—"*Lex tally-ho-nis*" ... 317

Damages—
  - Measure of—Negligence—Future prospects ... 40
    - False imprisonment ... 43

Death—Presumption of—Seven years without tidings ... 101
Declaration of qualification by candidate at municipal election ... 266
Debt—Promissory note—Continuing security ... 330
Deed—Of one partner—Does it bind the firm ... 117
  - Antedating with fraudulent intent is forgery ... 15
  - Custody of—Reconveyance of mortgaged estate ... 41

Degrees of negligence—Selection ... 284
Democracy—As seen by an United States Judge ... 311
Depositions—Admissibility of, as evidence in extradition cases ... 96
Digest of English Law Reports ... 19, 45, 78, 106, 131, 155, 188, 244, 269, 302
Discharge of insolvent—Confirmation ... 223, 254
Disease, contagious—Negligence in not disclosing ... 154

Division Court—
  - Certificate for costs ... 28
  - Jurisdiction of, under garnishee clause ... 320

Divorce—Women's rights ... 196

Dominion Arbitration, The—
  - Editorial ... 197
  - Report of proceedings ... 212

Dower, Practice in—Appearance by infant in person ... 264
Duration of a carrier's responsibility—Selection ... 315
Dying declaration, admissibility of, as evidence ... 185
Ecclesiastical monition—Evasive compliance with—"Kneeling" ... 67
*Edgar's, J. D.*, Insolvent Act of 1869—Review of ... 55

EDITORIALS—
  - Accidents, liability for ... 197
  - Arbitration, The Dominion ... 197
  - Assizes, opening of in England ... 312
  - Benchers (The) and The Law Society ... 1
  - Bills and notes, Stamps on—Epitome of Acts respecting ... 144
  - *Blake, Hon. Wm. Hume* ... 281
  - Chancery Judges, The New ... 4
  - Chancery Reforms ... 29
  - Chinese Trial, An extraordinary ... 87
  - Common Law Chambers ... 31
  - County Judges' Criminal Courts ... 87
  - Criminal Law Consolidation ... 57

**Editorials**—(*Continued.*) PAGE
Criminal Trials without Juries 93
English ceremonies at Assize 312
*Gowan, Judge*, Leave of absence 171
Interpleaders 88
Judicial Sentiments (U. S. Judge on democracy) 311
Law Society, The Benchers and the 1
" Examinations 82, 118, 158
Legislation of the Present (Dominion) Session 87
*Lex loci contractus—Lex fori* 113, 141, 169
Liability for accidents 197
Master in Chancery 253
Minister of Justice, Illness of the 113, 258
Multiplication of legal objections 172
Municipal Cases, Recent 85
Obstructions 310
Overholding Tenants 83
*Prince, Colonel*—Obituary notice 312
Real Property, Mr. *Leith's* new work on 33
Retainers and Retaining Fees (First Paper) 309
Royal Marriage Acts 288
Slander, Defects in the Law Respecting 98
Stamps on Notes and Bills 144
Statistics respecting Births, Marriages and Deaths 69
Supreme Court of Canada, The 200
Tenants, Overholding 38
Ejectment—Re-entry by defendant 36
Election Cases—
*Carter* v. *Lemesurier*—Election Committee—Amenability to judicial authority—Writ of prohibition 229
*Reg. ex rel. Flater* v. *Van Velsor*—Qualification of candidate—Incumbrances 151
*Reg. ex rel. Ford* v. *McRae*—Treasurer—Annual appointment—Notice to electors of disqualification 95
*Reg. ex rel. Gibb* v. *White*—Indians—Disqualification—Enfranchisement 153
*Reg. ex rel. Halsted* v. *Ferris*—Declaration of qualification—29, 30 Vic. cap. 5, s. 178 266
*Reg. ex rel. McGouverin* v. *Lawlor*—*Quo warranto* summons—When applicable 126
Embarrassing pleadings—Setting aside when irrelevant 11
English Law Reports—Digest 19, 45, 78, 106, 131, 155, 188, 244, 269, 302
Error and Appeal, Court of—Next Sittings 336
*Every Saturday*—Notice of 252
Evidence—
Admissibility of depositions in extradition cases 69
Of copies of depositions in extradition cases 227
Of dying declaration 184
Commission to examine witnesses abroad—Costs of 154
When it will be granted 180
Death, Presumption of—Seven years without tidings 101
Of accomplice in extradition cases 98, 228
Parol, Admissibility of—Latent ambiguity 216
Examination—
For call and admission—Hilary Term, 1870 32
Easter Term, 1870 118, 146
Interim—Mich. Term, 1870 253
Paper, attempt to purloin—Felony 168
Executions, Order in Council respecting 336
Execution, Writ of—
Stock in incorporated company, how bound by 228
Return to, amending after sale under 262

PAGE
Executor—Right to appoint agent before probate 182
Extent—Inquisition to find debts—Affidavit of danger 38
Extradition—
  Evidence necessary for 227
    Copies of depositions—When admissible 227
  Habeas corpus—Forgery—Evidence of accomplice 98
False imprisonment—Measure of damages 43, 73
False pretences—"Obtaining goods" 266
Felony—
  Stay of civil action during prosecution for 38
  Attempt to purloin examination paper 168
*Fi. Fa.*—*See* EXECUTION.
*Finlason, W. H.*—"History of the Law of Tenure in England and Ireland"—Reviewed 165
*Foley Hon. M. H.*—Obituary Notice 112
Forcible re-entry—Right of landlord to 121, 146
Foreign Corporation—
  Service of process on 181
  Place of business 32
Forgery—
  Ante-dating deed with fraudulent intent 15
  Extradition—Evidence of accomplice 98
Fraud—
  Order obtained by—Setting aside 43
  Implied warranty—Negligence—Contagious disease 154
France, Judicial system of 33
French Bar—Historical Sketch of 89, 118
*Gowan*, Judge, Leave of absence 171
*Harrison, R. A.*, Q.C.—Common Law Procedure Acts, 2nd Edition 33, 167, 308
*Hays*, Mr. Justice—Sketch of his life 8, 167
*Hemings, Geo.*, Esq. 56
*Holt, C. J.*, Anecdote of—The law and the prophets 317
Humourous Phases of the Law—Selection 258
Indians—
  Eligibility for municipal offices 153
  Copy of Sir Wm. Johnston's Treaty with, in 1764 86
Indictment, Form of—Correspondence 196
Infant, Custody of—
  Right of father 96
  Appearance by 184, 264
Injunction to restrain infringement of patent—Amount of damages 100
Insanity, The Law of 83, 84
Insolvency—
  Discharge of confirmation 223, 255
  Disposal of property by insolvent 9
  Misdescription of creditor in schedule 14
Insurance cases—
  Arbitration—Staying proceedings under C. L. P. Act, sec. 167 202
Interest on warrant of attorney 18
Interlocutory judgment, when pleas pleaded without leave 181
Interpleaders—Editorial on 58
Irregularity—
  In declaration 318
  In *Fi. Fa.* 318
  Waiver of right to set aside proceedings for 184, 291
*Jones* (Edwyn)—"The Law of Salvage"—Review 279
Judge—The New Chancery—Editorial 1
Judgment—Interlocutory—When pleas pleaded without leave 181

PAGE

**Judicial System of France** ........ 33

**Jurisdiction of Clerk of Queen's Bench in Chambers** ........ 291

**Jurisdiction of the Court of Chancery—Reformation of will** ........ 221

**Justices of the Peace—Duties as to Summary Convictions and Orders—Act respecting** ........ 178

***Kirkpatrick*, *Thos.* Esq.—Obituary Notice** ........ 112

**" Kneeling " in the Communion Service—Rev. Mr. *Mackonochie's* case** ........ 67

**Laches—Motion to set aside proceedings after fresh step taken** ........ 291

**Landlord and Tenant—**

  **Right of landlord to forcible re-entry** ........ 121, 146

  ***See* Overholding Tenant.**

***Law Journal, The*—Review** ........ 168

**Law Libraries, A word about** ........ 316

***Law Magazine and Law Review*—Notice of** ........ 111, 167

**Law Reform Act, Sec. 17—Taking down to County Court—Liquidated or ascertained** ........ 266

**Law Society—**

  **The Benchers and the—Editorial** ........ 1

  **Examinations for call—Hilary Term** ........ 82

  **" " Easter Term** ........ 118

**Law Students—**

  **Advice to—Selection** ........ 226

  **Interim Examination—Michaelmas Term** ........ 258

***Law Times and Law Times Reports*** ........ 168

**Legal Tender Act (U. S.)** ........ 48

**Legal Wit—Selection** ........ 288

**Legislation of the present Session—House of Commons** ........ 87

***Leith's* Real Property Statutes** ........ 33

**Levy, Vexatious—Improper affidavit** ........ 318

***Lex loci contractus—Lex fori—***

  **Which governs the limitation of personal actions—Editorials** ........ 118, 141, 164

**License—Sellling liquor without, no ground for *quo warranto*** ........ 86, 128

***Lower Canada Jurist*—Notice of** ........ 168

***Malloch*, Judge—Obituary notice** ........ 55

**Manslaughter** ........ 35

**Manx Justice** ........ 18

**Marriage Acts, Royal—Editorial** ........ 283

**Married Women—**

  **Next friend** ........ 41

  **Property of—Laws affecting it, discussed** ........ 206

**Master in Chancery—Editorial** ........ 258

**Master and Servant—**

  **Liability for accidents** ........ 197

  **Death of either determines contract** ........ 17

**Measure of damages—**

  **Future prospects—Negligence** ........ 40

  **False imprisonment** ........ 43, 78

***Mellish*, Lord Justice of Appeal—Sketch of Life** ........ 226

**Minister of Justice—Illness of the** ........ 118, 258

**Mistake—Chancery jurisdiction in cases of—Re-formation** ........ 221

***Morgan*, *Henry J.*—Parliamentary Calendar—Review of** ........ 140

**Mortgage—**

  **Discharge of, in England** ........ 146

  **Tender by Mortgage—Acceptance of—Reconveyance—Custody of title deeds** ........ 41

  **Effect on property qualification of candidate at municipal election** ........ 181

  **Foreclosure and Sale—Costs of—Puisne incumbrancers** ........ 328

**Multiplicity of Legal Objections** ........ 172

**Municipal Law—Property qualification of candidate—*Fi. fa.* incumbrances** ........ 86, 151, 266

  **Review of some recent cases** ........ 85

- **Municipal law**—(*Continued*) PAGE
  - Liability of corporation for neglect to repair ... 297
  - Treasurer—Annual appointment—Notice of qualification ... 94
  - Appeal from Court of Revision ... 295
- **Naturalization** ... 174
- **Negligence**—
  - Degrees of ... 284
  - Liability for accidents caused by ... 197
  - Evidence of—Admissibility of dying declaration ... 185
  - Measure of damages for ... 40
  - Contagious disease—Implied warranty ... 154
  - When remote cause of accident ... 186
  - Neglect of municipal corporation to repair ... 295
- **"Nephew"**—Meaning of ... 218
- **Next friend**—*See Prochein ami.*
- **Notice of Appeal from (English) County Court** ... 239
- **Notice of assignment**—Attachment—Right of garnishee ... 263
- **Notice of Trial**—Short notice "if necessary" ... 294
- **Obituary Notices**—
  - *Blake*, Hon. *Wm. Hume* ... 281
  - *Foley*, Hon. *M. H.* ... 112
  - *Hemings*, *George*, Esq ... 55
  - *Kirkpatrick*, *Thos.* Esq. ... 112
  - *Malloch*, Judge ... 55
  - *Roaf*, *John*, Esq. ... 252
- **Objections**—Multiplication of Legal ... 172
- **Obstructions**—Editorial ... 310
- **Overholding Tenants**—
  - Some conflicting decisions ... 33
  - Act respecting—"Landlord," meaning of ... 40, 65
- **Parol evidence**—Meaning of word "nephew" ... 218
- **Partner**—Power of one to bind firm by deed ... 177
- **Patent**—Injunction to restrain infringement—Damages ... 100
- **Pleading**—
  - Defence confessing part of demand without payment into court ... 244
  - Several pleas without leave ... 181
  - Striking out when embarrassing ... 11
- ***Pollock***, **the late Sir Frederick—Biographical Selection** ... 312
- **PRACTICE AT LAW**—
  - Affidavit to hold to bail—Entitling of ... 294
  - Arbitration—
    - Notice of meetings—Proceeding *ex parte* ... 125
    - Staying proceedings under C. L. P. Act, sec. 167 ... 292
    - Power of arbitrator as to certificate for costs ... 180
  - Arrest—Setting aside for irregularity ... 294
  - Attachment—
    - Sufficiency of affidavits for ... 9
    - Assignment—Notice to garnishees ... 263
  - Cause of action, where it arises—British subject out of jurisdiction ... 325
  - Children, custody of—Right of father ... 96
  - Commission to examine witnesses abroad—
    - Costs of ... 154
    - When granted since recent Evidence Act ... 180
  - Corporation, Foreign—
    - Place of business of ... 320
    - Service of process on ... 181

**Practice at Law**—(*Continued*). PAGE

- Costs—
  - Certificate for—
    - Division Court ... 28
    - When only nominal damages given—31 Vic. c. 24, s. 1 ... 26
    - Power of arbitrator as to ... 180
  - Election by plaintiff to reduce verdict ... 317
  - New trial on payment of—When to be paid ... 127
  - *See* Commission—Mortgage—Security for Costs.
- County Court—Taking case down to—Liquidated amount ... 266
- " " (English)—Appeal from—Notice of security ... 289
- Declaration—Irregularity in omitting plaintiff's name ... 317
- Defence confessing part of demand—Payment into court ... 244
- Discharge in insolvency—Confirmation of ... 223, 254
- Division Court—Jurisdiction of ... 320
- Ejectment—Re-entry by defendant ... 36
- Evidence—Admissibility of depositions ... 69, 227
  - " Dying declarations ... 184
  - Commission to examine witnesses ... 154, 180
  - Death, Presumption of—Seven years without tidings ... 101
  - Of accomplice in extradition case ... 98
  - Parol, Admissibility of—Latent ambiguity ... 216
- Executor—Right to appoint agent before probate ... 182
- Extent—Affidavit of danger—Commission to find debt ... 88
- *Fi. fa.*—How it binds stock in incorporated company ... 228
  - Return to—Amendment of after sale ... 262
- Foreign corporation—Service of process—Contract ... 181
- Insolvency—Misdescription in Schedule ... 14
  - Discharge—Confirmation ... 223, 254
  - Disposal of property ... 9
- Interlocutory judgment—When pleas pleaded without leave ... 181
- Irregularity—Waiver ... 184, 289
  - Plaintiff's name omitted from declaration ... 317
- Issue Book—Re-service of, when pleadings amended ... 180
- Jurisdiction of Clerk of Queen's Bench in Chambers ... 291
- "New trial on payment of costs"—When to be paid ... 127
- Next friend, Appearance by ... 41, 184, 264
- Notice of appeal from English County Court—Irregularity—Waiver ... 289
- Pleading several matters without leave ... 181
- Pleadings—Defence conferring part of demand without payment ... 244
  - Setting aside for duplicity ... 11
  - Waiver of right to set aside for irregularity ... 184
- Prohibition, writ of ... 212, 229
- *Quo warranto* summons—When applicable ... 128
- Replevin—Interlocutory judgment—Pleas without leave ... 181
- Service of process on foreign corporation ... 181
- Setting aside proceedings under C. S. U. C. cap. 128, ss. 3–8 ... 291
- Setting aside proceedings for irregularity after fresh step ... 184, 291
- Striking out pleas for irrelevancy ... 11
  - " Issues after demurrer ... 180
- Trial, by proviso not in force in Canada ... 65
  - " Short notice of, "if necessary" ... 294
- Venue, change of—Preponderance of convenience ... 18, 129
  - In criminal cases ... 64
- Witness—Privilege of, from arrest ... 11
- *See* Appearance—Arrest—Election cases—Executor—Infant—Measure of Damages—Retainer—Stock

PRACTICE IN EQUITY— PAGE
- Costs of foreclosure sale—Puisne incumbrancer ... 328
- Dismissal of bill by consent, a bar to action—Order by consent—Fraud... 43
- Equitable waste—Tenant for life and reversioner—Injunction—Damages ... 329
- Injunction to restrain infringment of patent—Damages ... 100
- Mistake—Equity jurisdiction in case of—Reformation ... 221
- Next friend of married woman ... 41
- Warrant of attorney—Rate of interest on ... 18
- *See* Appearance—Married woman—Mortgage.

Precatory trusts in wills, Notes on ... 254
Presumption of death—Seven years without tidings ... 101
Primogeniture—Should English law as to, be changed ... 59
*Prince*, Colonel—Obituary Notice ... 312
*Prochein ami*—
- Of infant ... 184, 264
- Of married woman ... 41

Prohibition, writ of—When it lies ... 212, 229
Promissory Notes—*See* Bills and Notes.
Proviso, Trial by, abolished ... 65
Proximate cause—Liability of railway company for negligence ... 186
Puffer, employment of, at auction sale ... 42
*Quo warranto*—*See* Election Cases.

Railway Companies—Liability of, for accidents ... 186, 197, 336
Real Property—Mr. *Leith's* recent work on ... 83
Recent Municipal cases—Editorial ... 85
Reformation of will—Jurisdiction of Chancery ... 221
*Regina* v. *Gurney*—Notice of the report ... 111
Registration of Births, Marriages and Deaths ... 59
Replevin Act—Several pleas without leave ... 181
*Res judicata*—Staying proceedings—Order by consent equivalent to decree ... 43
Retainers and retaining fees—Editorial (First Paper) ... 309

REVIEWS—
- *Albany Law Journal* ... 84
- *American Law Review*, January, 1870 ... 83
- *American Law Register* ... 84
- *Bench and Bar* ... 84
- *Blackwood's Edinburgh Magazine* ... 27
- *Canadian Illustrated News* ... 168, 252
- *Edgar, J. D.*—The Insolvent Act of 1869, with Tariff, &c ... 55
- *Every Saturday* ... 252
- *Finlason, W. H.*—History of Law of Tenures in England and Ireland ... 165
- *Harrison's* C. L. P. Act—2nd Edition ... 88, 167, 308
- *Jones, Edwyn*—The Law of Salvage ... 279
- *Law Journal* (England) ... 168
- *Law Magazine and Law Review* ... 111, 167
- *Law Times* and *Law Times* Reports ... 168
- *Lower Canada Jurist* ... 168
- *Morgan, H. J.*—Canadian Parliamentary Calendar ... 140
- Report of *Reg.* v. *Gurney* ... 111
- *Rordan's Ontario Law List* ... 279
- *Taylor, T. W.*—The investigation of titles ... 54

Revision—Court of—Appeal from ... 295
Rights of the Profession—Selection ... 36
Ritualistic Practices—Disobedience to monition ... 67
*Roaf, John*, Esq., Q.C.—Obituary Notice ... 252
Roman Youth—Education of—Selection ... 308
*Rordan's Ontario Law List* ... 279

PAGE
Royal Marriage Acts—Editorial ... 283
Salvage, The Law of—Review of Mr. *Edwyn Jones*' work on ... 279
*Scott, J. G.*, Esq.—Appointment as Clerk of Executive Council ... 254
SELECTIONS—
  Advice to Law Students ... 226
  Alabama Claims, The ... 4
  Carriers—Duration of Responsibility ... 315
  "Challenging the Array" ... 224
  Clerical Disabilities ... 124
  Contraband of War ... 257
  Costs, Security for—Justice of exacting in many cases ... 61
  Curran's Puns ... 317
  Degrees of Negligence ... 284
  Duration of a Carrier's Responsibility ... 315
  France, Judicial System of ... 83
  French Bar (The), Historical Sketch of ... 89, 118
  *Hays*, Mr. Justice ... 8
  *Holt*, C. J., Anecdote of—The Law and the Prophets ... 317
  Humourous Phases of the Law ... 258
  Judicial System of France ... 83
  Landlord, Right of, to Forcible Re-entry ... 121, 146
  Law Libraries, A word about ... 316
  Law Students, Advice to ... 226
  Legal Wit ... 238
  Manslaughter ... 85
  Married Women—Laws affecting property of, in various countries ... 206
  *Mellish*, Lord Justice—Sketch of ... 226
  Naturalization ... 174
  Negligence—Degrees of ... 284
  Partner, power of one, to bind firm by deed ... 177
  *Pollock*, the late Sir *Frederick* ... 312
  Precatory Trusts in Wills, Notes on ... 254
  Primogeniture—Necessity for change of law respecting ... 59
  Rights of the Profession ... 86
  Roman Youth, Education of ... 308
  Slander ... 92
  Specific Performance in Cases of Hardship ... 314
  Tenures, Examples of some curious ... 56, 112
  *Thurlow* (Lord) and Bishop *Horsely* ... 8
  Wills, Notes on Precatory Trusts in ... 254
Service of process on foreign corporation ... 181
Setting aside proceedings—
  Laches—C. S. U. C. cap. 128, sec. 8 ... 291
  For irregularity, after fresh step ... 184, 291
Several matters—Pleading without leave ... 181
Slander—Defects in law respecting ... 92
Specific performance, or damages, in cases of hardship ... 314
Stamps on Bills and Notes—Editorial ... 144
Statistics respecting registration of births, &c.—Editorial on ... 59
Staying proceedings under sec. 167, C. L. P. Act—Arbitration ... 292
Stock—How bound by *fi. fa.* ... 228
Students, Law—Advice to ... 226
Summary Convictions, Act respecting ... 178
Sunday, Coroner's Inquest on ... 317
Supreme Court of Canada—Text of the Act respecting ... 200
Synod—Jurisdiction of, over Vestry ... 328

PAGE

*Taylor, T. W.*, on Investigation of Titles to Real Estate—Review of ... 54

Telegram—Who is liable for mistake in sending ... 330

Tenant for life and reversioner—Equitable waste ... 329

Tenants in common—Action of trespass by one against another ... 268

Tenants, Overholding—

  Some conflicting decisions ... 33

  Act respecting—Meaning of word "Landlord" ... 40, 65

  Examples of some curious rents ... 56, 112

Tender by mortgagee—Reconveyance ... 41

Tenures in England and Ireland—*Finlason* on the Law of ... 165

Title Deeds, Custody of, on re-conveyance of mortgaged estate ... 41

Trespass—

  By one tenant in common against another ... 268

  To person—Measure of damages—Provocation ... 43, 73

  Right of landlord to forcible re-entry ... 121

Trial by proviso—Said to be abolished by the C. L. P. Act, and not in force here ... 65

Trial, short notice of, "if necessary" ... 294

Trust, what words sufficient to create ... 268

Trusts, Precatory, in wills ... 254

United States Statutes—Revision of ... 335

Venue, change of—

  Preponderance of convenience ... 18, 129

  In criminal cases ... 64

Vestry meeting—Amenability to Synod. ... 328

Vital Statistics—Editorial on ... 59

Voluntary settlement—Intent to delay or defraud—Subsequent creditor ... 240

Warrant of attorney—Interest on ... 19

Waste, Equitable—Ornamental timber—Tenant for life and reversioner—Injunction—Damages. 329

Wills—Construction of ... 18, 196, 218, 268

  Notes on precatory trusts in—Selection ... 254

  Reformation of—Chancery jurisdiction as to ... 221

Witness—Privilege of from arrest ... 11

Womens' Rights ... 196

Words—Construction of—

  "*Liquidated*" or "*ascertained,*" ... 266

  "*Nephew*" ... 218

  "*Obtaining*" goods ... 266

  Short notice of trial "*if necessary*" ... 294

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